United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1911.

No. 2219. 778

LILLIAN M. CHAPMAN, APPELLANT,

vs.

CAPITAL TRACTION COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 9, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 8, 1911.

In the Court of Appeals of the District of Columbia.

No. 2219.

LILLIAN M. CHAPMAN, Appellant,
vs.
CAPITAL TRACTION COMPANY, a Corporation.

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a Supreme Court of the District of Columbia.

At Law. No. 51903.

LILLIAN M. CHAPMAN, Plaintiff,
vs.
CAPITAL TRACTION COMPANY (a Corporation), Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed Aug. 31, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51903.

LILLIAN M. CHAPMAN, Plaintiff,
vs.
CAPITAL TRACTION COMPANY (a Corporation), Defendant.

The plaintiff, Lillian M. Chapman, sues the defendant, Capital Traction Company, a corporation, for that heretofore, to wit, on the 18th day of July, A. D., 1909, and before and since that time, the said defendant was a common carrier of passengers for hire and as such was operating a certain street railway with cars propelled by electricity upon and along certain streets, avenues and highways and among others New York Avenue, Fourteenth Street Northwest,

Cincinnati Street and Connecticut Avenue in the City of Washington, District of Columbia and at other places within said District. And the plaintiff says that on the date aforesaid she, the plaintiff, at or near the intersection of New York Avenue and Fifteenth Street Northwest in said city, entered one of the defendant's said cars, to wit, Car No. 1, of the style or type known as "Pay within" or "Pay-as-you-enter" cars, which said car was then Northbound upon and by way of New York Avenue, Fourteenth Street Northwest and other streets and highways in said city to Cincinnati Street and Rock Creek Bridge and thence upon Connecticut Avenue to
2 Chevy Chase, all in said District; that she so entered said car as a passenger and was accepted by the defendant as such; that as such passenger she occupied a seat in said car provided by the defendant for the use of passengers and next to an open window on the left side of said car, across which window were bars, upon one of which bars the plaintiff rested her left arm; that from the place where she so entered said car to said Rock Creek Bridge there were no trolley poles or other obstructions or dangers along the route or near the tracks of said car; that while the plaintiff was so occupying said seat as a passenger and her arm so resting on said bar and while said car was then proceeding Northward on Connecticut Avenue between or near Woodley Lane and Garfield Street immediately after passing said bridge and without any notice or warning to her of the proximity of a trolley pole or other danger, her left hand, which was momentarily turned from the wrist outward from the position of her arm on said bar, was then and there, in the forward movement of said car, thrust and caught against a trolley pole which was then and there, by the defendant, negligently maintained and allowed to remain so near said car as to imperil passengers therein, to wit, at a distance of five inches from said bar and said window, and thereby her left hand was violently bent backward at the wrist joint and the bone known as the radius of her left wrist was fractured and her left elbow forced violently backward against the side of the window frame and said arm was sprained and she sustained great shock and was thereby otherwise greatly injured and from thence hitherto she has suffered and will hereafter continue to suffer great pain of mind and of body, insomnia, loss of appetite, neurasthenia and other
3 disorders and she has been and will continue to be disabled and unable to attend to her affairs and has been and will continue to be put to great expense, to wit, in the sum of $500 in and about her efforts to be cured and has been and will continue to be thereby greatly injured and damaged, to wit, in the sum of $25,000.

And the plaintiff claims judgment in the sum of Twenty-five thousand dollars ($25,000), besides costs.

LORENZO A. BAILEY,
Attorney for Plaintiff.

4 *Plea of Defendant.*

Filed Sep. 16, 1909.

* * * * * * *

The Capital Traction Company, the defendant in the above-entitled cause, for a plea to the declaration of the plaintiff, Lillian M. Chapman, heretofore filed therein, says that it is not guilty in the manner and form therein alleged.

R. ROSS PERRY AND SON,
G. THOMAS DUNLOP,
Attorneys for Defendant.

Joinder in Issue.

Filed Sep. 21, 1909.

* * * * * * *

The plaintiff joins issue upon the plea of the defendant filed herein.

LORENZO A. BAILEY,
Attorney for Plaintiff.

Memorandum.

June 7, 1910.—Verdict for defendant.

5 Supreme Court of the District of Columbia.

WEDNESDAY, *June* 15, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

The time within which to move for a new trial having expired, judgment on verdict is ordered.

Therefore, it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense, to be taxed by the Clerk, and have execution thereof.

Order for Appeal.

Filed Jun- 21, 1910.

* * * * * * *

The Clerk of said Court will enter an appeal to the Court of Appeals D. C. from the judgment herein and issue citation to the defendant.

LORENZO A. BAILEY,
Attorney for Plaintiff.

6 In the Supreme Court of the District of Columbia.

Filed Jun- 21, 1910. J. R. Young, Clerk.

At Law. No. 51903.

LILLIAN M. CHAPMAN, Plaintiff,
vs.
CAPITAL TRACTION COMPANY, a Corporation, Defendant.

The President of the United States to Capital Traction Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal filed in the Supreme Court of the District of Columbia, on the 21st day of June, 1910, wherein Lillian M. Chapman is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 21st day of June, in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By FRED C. O'CONNELL,
Ass't Clerk.

Service of the above Citation accepted this 21st day of June, 1910.

R. ROSS PERRY & SON,
Attorneys for Appellee.

[Endorsed:] 7. No. 51903. Law. Lillian M. Chapman vs. Capital Traction Company. Citation. Issued June 21st, 1910. Lorenzo A. Bailey, Attorney for Appellant. Filed Jun- 21, 1910. J. R. Young, Clerk.

7 *Memorandum.*

June 27, 1910.—Appeal bond approved and filed.

Supreme Court of the District of Columbia.

MONDAY, *August 1st,* 1910.

Session resumed, Hon. Dan Thew Wright, Justice presiding.

* * * * * * *

The Court having this 1st day of August 1910, signed the Bill of Exceptions heretofore submitted herein, now orders the same of

record as of the time of the noting thereof at the trial, and pursuant to agreement of counsel the time to file a transcript of record, is extended to and including September 15" 1910.

Bill of Exceptions.

Filed Aug. 1, 1910.

* * * * * * *

Bt it remembered that the above entitled cause came on for trial at the April Term of Court, before Mr. Justice Wright and a jury, on the 6th day of June, A. D. 1910, and ended on the 7th day of June, A. D. 1910.

8 And thereupon, to maintain the issues on her part joined, the plaintiff produced as a witness W. B. JONES, of lawful age, who, having been first duly sworn, testified:

That the trolley pole No. 216 is situated between Woodley Road and Garfield Street, on Connecticut Avenue between the north bound track and the south bound track of the defendant company. That there is a rim or knob on the pole 6 feet and 1⅛th inches from the ground; 6 feet to the bottom of the rim. That the distance from the east edge of that rim to the center of the north bound track is 4 feet 11¾ inches; that is from the side of the pole proper, and the rim extends an ich and a quarter beyond that, so that the distance from the center of the north bound track to the east edge of that rim is 4 feet 10½ inches. From the center of the south bound track it is 5 feet 1⅞ inches to the pole proper and, on the other side, 4 feet 11¾ inches.

Pole No. 217, just south of pole No. 216, is exactly the same.

Pole No. 218 is a little farther away from the north bound track.

Pile No. 215, just to the north of pole No. 216, is a little farther away; and Pole No. 214 is practically the same as 215.

And next to maintain the issues on her part joined, the plaintiff produced as a witness PAUL WEIR, who, having been first duly sworn, testified that—

He, in company with the plaintiff, boarded car No. 1 of the defendant company at New York Avenue and 14th street,
9 bound for Chevy Chase Lake; that the plaintiff sat in the first front cross-wise seat, about 6 feet from the front of the car. She sat next to the window and the witness on the seat beside her, to her right. That they were on the left side of the car. That the car proceeded out New York Avenue to 14th Street and out Columbia Road; that it crossed the bridge and went out Connecticut Avenue and, just as they passed Woodley Lane the plaintiff was looking out of the window and she spoke something about a house in the course of construction on the left side of the tracks and, in calling witness' attention to it, she had her arm on the top bar of the window. She merely pointed over, directing his attention to the house and at that instant, passing a pole, the pole caught the outer end of her

finger and drew her hand back and pushed her hand against the window jam. That the plaintiff and the witness paid their fares to the conductor at the rear end of the car, when they first entered; that the witness believes the conductor never leaves his post at the end of the car. That on the occasion in question he did not leave his post, so far as witness knows, all the way out. That it was warm, clear weather, and all the windows in the car were open; that the plaintiff rested her arm on the top of the top bar. That the only persons representing the company that witness knows of, in the car, were the motorman and the conductor. The motorman was in the front of the car and the conductor was in the rear. The conductor is not supposed to leave that place in the pay-within cars. That the windows remained open all the time they were in the car. That there were no signs on the car cautioning passengers to be careful,
10 not to put their heads or arms out of the window, and there was no sign of any kind notifying them of danger. That the first trolley pole or obstruction between the tracks at any point, after leaving 15th street and New York Avenue, were the poles starting across Rock Creek bridge. That it is the impression of the witness that the plaintiff rested her arm on the bar as soon as she sat down in the car. That at the time she was injured, her fingers did not extend any more than the length of the hand from the bars, by turning it over; that she did not raise her forearm off the bar in the least, she simply turned her hand over; that her fingers struck the rim or knob on the trolley pole, which extends over an inch from the pole itself. That this rim or knob is the widest part of the pole and is just level with the top of the top bar on which her arm rested on the car.

And next thereupon the plaintiff, by her counsel, asked witness the following question:

"Q. Referring to this attitude which she took, resting her arm on the bar, was it anything unusual or unlike the common habit of passengers on that car?"

To the asking of which question the defendant, by its counsel then and there objected and the Court sustained the said objection; to which action of the Court excluding said question the plaintiff, by her counsel, then and there duly excepted, which exception was then and there duly noted by the Justice, in his minutes.

That the witness further testified that he, in company with the plaintiff, had ridden out on those cars both before and since
11 the accident to the plaintiff. That after the accident, the witness ascertained by measurement that the distance from the top bar of the window, at which the plaintiff was seated, of car No. 1, to the rim or knob of pole No. 16 is a little over 4½ inches. That the measuring was done, in the manner the witness illustrates by projecting a piece of paper from a model of a section of the car representing a window section of the car in question, which was produced in Court by the defendant. That he made such measurement on July 24th while the car was going and several times since and got the same result—four and one-half inches. That at the time of such

test the car was going in about the same manner and at about the same speed as at the time of the accident.

And next thereupon the witness was asked the following question, by counsel for the plaintiff:

"Q. How long, to your knowledge, had this pay-within car been in use on that line?"

And counsel announced to the court that he proposed to follow this question up by showing that it had been in use only a short time and that other cars used on that road, shortly prior to that time, were of a different make and this car is much wider; and that by increasing the width and bringing the windows nearer the pole, the danger is increased, without notice having been given of such danger.

To the asking of which question the defendant by its counsel, then and there objected and the Court sustained the said objection; to which ruling of the Court, excluding said question, the plaintiff, by her attorney, then and there duly excepted, and said exception was duly noted by the Justice, in his minutes.

12 That the witness further testified that the width of the car, from the bar of the window at which the plaintiff sat, to the corresponding bar on the opposite side of the car, was 8 feet 10¾ inches. That witness, in company with the plaintiff, measured other cars of a different type of the defendant company, among others car No. 13, which was a closed car of the early types; that that car measured, from window to window, 7 feet 9½ inches outside measurements. That they also measured car No. 103, another closed car, which was found to be 8 feet 2 inches wide; also car No. 809, which was an open car, and was 8 feet 2 inches wide from handle bar to handle bar.

That the witness and the plaintiff had previously ridden out to Chevy Chase on a number of those cars, but that the time of the accident to the plaintiff was the first time they had ridden out on one of those large cars. That they made measurements at different parts of that same track on that route to see whether or not there was any difference in the distance between the west rail of the northbound track and the east rail of the southbound track. In making these measurements they went to the turn of the Bridge southward and northward as far as the Zoo and also at Chevy Chase Lake.

That they had measured two poles to the north of pole No. 216, and three or four poles to the south of it; that at two places they found the inner rail of the north bound track and the inner rail of the south bound track as near together as they were at pole No. 216; that these places were south of the point where the accident occurred.

That it narrows from the Zoo to the curve where the cars
13 turn and go across the bridge.

And next thereupon the plaintiff, by her counsel, asked the following question:

"Q. From the Zoo out to Chevy Chase Lake do these two rails maintain the same width apart; are they parallel, or do they widen or converge?"

To the asking of which question the defendant, by its counsel, then and there objected and the court sustained the said objection;

to which ruling of the court excluding said question, the plaintiff, by her attorney, then and there duly excepted and the exception was duly noted by the Justice, on his minutes.

And next thereupon the plaintiff, by her counsel, made the following statement privately to the court outside the hearing of the jury:

"I offer to prove by this witness that those tracks were wider out at the Lake, a great deal wider apart, so that in passing a trolley pole out by the Lake, or even at Chevy Chase, this passenger would have been safe and what she did would have been entirely safe, and it is only at this point that this accident would have occurred in her doing just what she did do. In other words, that the window was nearer to the trolley pole at that point than it would be, to any other trolley pole along there, north of it—these two or three poles right along there.

To which offer of proof the defendant, by its counsel, then and there objected, and the Court sustained the said objection and excluded said proof; to which action of the Court the plaintiff, by her counsel, then and there duly excepted, and the exception was
14 duly noted by the Justice in his minutes.

And next thereupon the witness further testified: That he was not much of a judge of speed, but the car, at the time of the accident, was running at full power he should say, between 15 and 20 miles an hour and was going as those heavy cars do. That they sway a little from side to side, very gently. That it was running with a swaying motion, according to the levelness of the tracks; that at the points where the tracks were depressed it would sway to one side or the other, whichever way the depression was.

And next thereupon the said witness, upon cross examination, testified as follows: That the accident occurred about 2:45 P. M. That the poles are about 100 feet apart.

That the plaintiff's hand struck pole No. 216. That the plaintiff had a white glove on her hand and the white glove bore a black mark and you could see where the dust had been wiped off pole No. 216 by her hand striking the pole at that projection. That the accident happened on the 18th of July, and on the 24th of that month witness and the plaintiff saw where the dust had been knocked off the rim of the pole No. 216 by this accident. That neither witness nor the plaintiff spoke to the conductor of the accident having happened.

And next thereupon, on redirect examination, the witness testified that he found, upon measurement, that pole No. 216 was 2 inches nearer the north bound track on which the car was running at the time of the accident than it was to the south bound track.

And next thereupon, to maintain the issues on her part joined, the plaintiff was produced as a witness on her own behalf,
15 and, having been first duly sworn, testified that she was in the business of a ladies' tailor. And thereupon she was asked, by her counsel, the following question:

"Q. How long have you been engaged in that business?"

To which question the defendant, by its counsel, then and there

objected and the Court sustained said objection; to which ruling of the court excluding said question the plaintiff, by her counsel, then and there duly excepted, and the said exception was then and there duly noted by the Justice in his minutes.

And next thereupon, the plaintiff testified that on the 18th of July, Sunday afternoon, she boarded pay-within car No. 1 of the defendant company, in company with Mr. Weir, at New York Avenue and 15th Street. They were new cars. That she sat in the front seat, next to the window. That it was very comfortable, and she put her left arm right on the top bar, as she saw people do. That it was comfortable for her to do that. That they rode out 14th Street, then out U street and then out Connecticut Avenue, and she remembers speaking of a new house at Woodley Lane and just slightly turned her head, not taking her arm off the bar. That her left hand was then struck. That she was so sick and stunned, she couldn't speak; that she recovered partially at Chevy Chase Circle when the car stopped there, and got out of the car at that point. That the wrist is now stiff. The pain has never left her and many nights it will pain her all night and if she uses it in her business she cannot put in one day's work since the accident. That her arm is so stiff that it seems to be grown together.

And next thereupon, the plaintiff, by her counsel, was
16 asked the following question:

"Q. I ask you what, if anything, you can't do now with that hand and wrist and arm, that you could do and did do before this accident? A. In sewing and in cutting and in fitting, it interferes. I could use both hands, and did use both hands, before the accident.

"Mr. PERRY: I move that that be stricken out.

"The WITNESS: It is my living.

"Mr. PERRY: I move that that be stricken out.

"The COURT: The motion is granted.

"Mr. BAILEY: Exception."

And the Court thereupon duly entered the said exception in his minutes.

And next thereupon the witness testified that the hand is very weak and the wrist is stiff and the ligaments have grown together and she cannot do anything that she could do before with the hand, but simply use the fingers. That she has been a musician.

And next thereupon the plaintiff, by her counsel, made the following statement privately to the Court outside of the hearing of the jury.

"Mr. BAILEY: I offer to prove by this witness that she is a trained and skilled musician on the violin and piano, and a painter of pictures; that since this accident, by reason of the accident, she is unable to use the violin or perform on the piano or to paint.

To which offer of proof the defendant, by its counsel, then and there objected and the court sustained the said objection,
17 on the ground that it is a special damage that should have been pleaded; to which action of the Court excluding said

proof the plaintiff, by her counsel, then and there duly excepted, and the Justice duly entered the said exception in his minutes.

And next thereupon the witness indicated upon the model of a section of the car referred to by the preceding witness Weir in which the accident occurred, the attitude of her arm on the bar and the motion she made with her hand at the time the accident occurred, and the distance of the pole from the bar.

And next thereupon the witness further testified that she could tell by her glove that the joint of the trolley pole hit the tips of her fingers and drew her hand back; that she identifies the glove produced in court, before the jury as that she wore at the time of the accident, that it is a new glove and is torn between the thumb and the hand. That it was not torn before it struck the pole. That she had never before ridden on any of the large new cars of the defendant company; that the other cars on which she had ridden, previous to the accident, were much narrower and, consequently, further from the poles. That the measurements of such other cars, made by Mr. Weir, are correct. That there were no signs or notices posted in the car on which the accident occurred, warning of any danger from any trolley pole. That she put her arm on the top bar when she first got in the car and retained that position all the way to the place of the accident.

And next thereupon, on cross examination, the witness testified:

That she was accustomed to ride out to Chevy Chase, or in
18 that direction, on the Chevy Chase cars, every summer for the past ten years and over, during the warm months; sometimes twice a month, sometimes once a month, and sometimes oftener. That she knew that after the cars crossed Rock Creek bridge they ran by overhead trolley and that the trolley posts were there. That she presumes she first observed them the first time she rode out there and has known for years about where they were.

And next thereupon the witness testified as follows:

By Mr. PERRY:

"Q. I do not know whether I could expect you to recollect particularly about this car, as it was the first time you were on it—— A. Yes sir; they had only been on a short time.

"Q. Would you recollect how the iron bars were placed on the outside of the window at your side? A. Yes, sir.

"Q. Will you be kind enough to look at this model? Please look at that and see whether that is a true representation of the window at which you sat. A. Yes, sir; it is.

"Q. This represents the seat. Is that accurate, so far as you recall? A. I think it is; because this bar comes below my shoulder, and my arm rested comfortably here (indicating).

"Q. The bar came below your shoulder, so you had to raise your elbow to put it on it? A. Yes, sir; just the way I have it now (indicating).

"Q. I do not think I will trouble you any further about that. I understand you were much better acquainted with these other
19 cars than you were with that car? Is that correct? A. Naturally, riding in them.

"Q. You knew there were no bars on the other cars, did you not? A. Yes, sir.

"Q. On the windows of the other cars? A. Yes, sir.

"Q. And in fact there were no bars on the windows of the other cars? A. Not that I know of.

"Q. I understand that the reason why you changed your arm or hand in any way as to its position was that you wanted to point out to Mr. Weir some house or some object to which you wished to call his attention? A. Yes, sir.

"Mr. PERRY, JR: I would like to get her position in that seat.

"(By means of a chair and the model heretofore referred to) of the window, the witness illustrated how she sat by the window in the car in question.)"

And next to maintain the issues on her part joined, the plaintiff produced in evidence the testimony of Dr. WILLIAM L. MASTERSON and deposition of Dr. TRUEMAN ABBEY, tending to prove that the small bones of the left wrist of the plaintiff are all matted together and that she sustained a further fracture of the end of the radius of the left wrist, and that the injury is permanent.

And thereupon the plaintiff announced by her counsel that her case was closed.

20 And next thereupon, to maintain the issues on its part joined, the defendant produced, as a witness on its behalf, JOHN MCKAY, who, being first duly sworn, testified—

That he is a wood worker employed by the Capital Traction Company, and constructed the model which was produced before the jury in the trial of this cause and which was the model referred to in the testimony of the plaintiff and her witness Paul Weir. That it is an exact duplicate of one window section, including the base of the window and the floor and top of car No. 1, pay-within type.

And next thereupon, the witness testified as follows:

By Mr. PERRY:

"Q. In order that we may get it into the record, I want you first to give me the exact distance from the sill of this window on the outside, right under this first transverse bar—the exact distance of the first bar from the window sill. Take the lower part of the bar. A. Three and one-eighth inches.

"Q. Now take the distance between the bar that you have just spoken of and the horizontal bar immediately above it, on the side of the same window, and give that distance. A. Three inches.

"Q. Now give the distance between the second of those horizontal bars and the one immediately above it and parallel to it? A. Three inches.

"Q. Give the distance from the third bar, being the one of which you have just spoken, to the fourth horizontal bar immediately above it and parallel to it? A. Three inches.

21 "Q. Give me the diameter of each of those bars there. They are approximately the same diameter. A. Half inch iron rod.

"Q. Now, then, give me the distance from the sill of the window to the top of the fourth or highest of these bars. A. Fourteen inches.

"Q. Then give me the distance from the top bar to the lower edge of the window sash when opened? A. Thirteen and a quarter inches.

"Q. Now then, will you state what these two pieces of wood here, which I show you, are intended to represent? A. It represents the seat.

"Q. Are or are not these two pieces of wood, placed as they are, an exact representation of the seat immediately in front of the window in this pay-within" car No. 1? A. Yes, sir.

"Q. Give me the distance from the seat to the top bar. A. Twenty two inches.

"Q. Twenty-two inches towards the front. Now take it towards where the back of the seat comes down to the seat itself? A. Twenty-three inches and a half."

And next thereupon, on cross examination, the witness testified as follows:

By Mr. BAILEY:

"Q. I understood you to say that you measured one of the windows of that No. 1 "pay-within" car? A. No, sir; I measured all of them.

"Q. You measured all of them? Is one window exactly
22 like another? A. Well, sir, they vary about a sixteenth of an inch.

"Q. Not more than that, any of them? A. No, sir.

"Q. Is this window adjusted there at exactly the same height that all those windows in the cars would be when they are up? A. Yes, sir.

"Q. And these measurements which you have given—would they be the measurements as to any window in that car, as to these bars and all that? A. They will; yes, sir.

"Q. And the seat? A. Yes, sir.

"Q. Does the front seat on the left hand side, the front seat that runs across the car, you know, come as far forward as this seat does here, the end of this piece? A. Yes, sir.

"Q. Is it just the same distance from the bottom of the window frame that this is here? A. Yes, sir.

"Q. Does this (indicating) represent the top of the seat? A. That represents the top.

"Q. Is there not any material placed over that—slats or anything at all? A. That is supposed to show the cushion. That is the cushion.

"Q. Oh, that is? A. That is the top of the cushion.

23 "Q. How about these bars? Are they fixed on exactly like the bars on that car? A. Yes, sir.

"Q. Does that piece there represent the floor of the car? A. Yes, sir."

And next thereupon, to maintain the issues upon its part joined, the defendant produced as a witness JOHN H. HANNA, who being first duly sworn, testified:

That he is chief engineer of the defendant company; that he has been engaged in the engineering business 18 years and has been in the employ of the defendant company about 16½ years.

That car No. 1 of the defendant company, mentioned in the testimony of the preceding witness, weighs about 46,000 or 47,000 pounds, and is used entirely for the suburban or interurban service of the company. It is of the pay-within type. That the model produced in court, which has been mentioned in the testimony of the preceding witness, is a correct representation of a section of the car—a longitudinal section as to one window. That cars of the type of car No. 1 are generally used in interurban service—service running from the city out into the country. That the four bars across the windows of this car were put there by his direction.

And next thereupon the witness testified as follows:

By Mr. PERRY:

"Q. What did you do in regard to ascertaining the best safeguards to be used before you had that type, those four bars, put
24 there? A. When the details of this car were being decided, I examined a good many cars on different roads, and a good many cars under construction in the car shops—several car shops.

"Q. Tell where you went to in order to find out all this? A. I went to Philadelphia, and I saw a good many cars in the shops there, and a good many cars in the shops at Cincinnati, and I have examined cars on similar lines wherever I happened to be. After that, and after looking at the cars and discussing the question with the other officers of the company and with car builders who were familiar with the general practice, this was adopted as what we considered the best and the most up-to-date method of protecting the window that we could find.

"Q. State whether or not it would be practicable, in order to prevent any passenger from putting his or her arm or head or hand out of the window, to bar the window entirely, so as to have no window there at all? A. Yes, sir; of course the window could be closed with glass, or practically closed with a very fine screen.

"Q. And what are the practical objections to adopting any such protection as that? A. The objection is that these cars are designed for the comfort of the passengers. A good deal of the travel is excursion travel and we attempt to make them as comfortable for the passengers as we can. Any car with such a guard, we consider, would not be in any way as comfortable or pleasant to the traveling public as the guard that we have put on this car.

25 "Q. I suppose if the windows were closed up entirely, there would be no *window* there; would there? A. No, sir.

"Q. What other device do you know of, if any, that is used in order to protect the passengers, by way of safeguarding the windows, that can be used at all for summer use? A. At times screens are used, a fine wire mesh screen. In my opinion, to be any better than

this it would have to be so small a mesh as to prevent a finger from going through it. I have known of cases where that was used; but it is very unusual.

"Q. In order that passengers within may see out, and in order that in summer they may be able to get the advantage of the breeze, what is the reasonable limit, the practical limit, of the height of the protection, whatever it may be? A. The height of the protection is governed by the natural position of the passenger's arm in sitting, so that it would come up well above the sill, and the hand in this position (indicating) could not be thrown out of the car without striking an obstruction. The distance between these window-guards is governed as being the distance through which the hand cannot be placed without touching the bars and making the passenger aware of the fact that the bar is there; the idea being as soon as the bar is brought to the attention of the passenger, that is in itself a warning to the passenger that the hands or head or anything else should not be placed outside of the window.

"Q. With respect to the height of that top bar from the seat, what considerations governed the company in selecting that dis-
26 tance? Do you understand the question? A. Yes. I thought I answered that before. That was so as to get the top bar high enough to prevent the hand or arm from getting out without first coming in contact with the bar; not so high that it cannot be put out, but so that it cannot be put out of the window without touching the bar, and without being aware that the bars are there.

"Q. Mr. Hanna, are you familiar with the position of the company's tracks on the ground there, from the Zoo Park to the bridge across Rock Creek? A. Do you mean the distance between the tracks at that point?

"Q. Yes. A. Yes.

"Q. State whether or not it is practically uniform? A. Practically.

"Q. State whether or not it slopes—whether the tracks there slope toward each other, from the Zoo to the bridge? A. They do not."

And next thereupon, upon cross examination, the witness testified: That when he selected this method of protection for car No. 1, he knew it was to be used on the Chevy Chase line and that it would come within 4½ or 5 inches of the trolley pole; that he knew how far that trolley pole was from the car. That from the Zoo to Rock Creek bridge there is about the same distance from each trolley pole to the car.

And next thereupon, the plaintiff, by her counsel, asked
27 the witness the following question-:

"Q. Do you know how far the other trolley poles further out, and further in from that point, are from the car? A. They vary probably an inch to an inch and a half, one from the other, due to the pole being a little out of plumb; but that is about the distance of all of them.

"Q. Does the distance increase as you go out toward the Lake?

"Mr. PERRY: I object to that. It should be limited to the distance from the Zoo to the Bridge. That is what we have been inquiring about here."

And the Court sustained said objection; to which ruling of the Court excluding said question the plaintiff, by her counsel, then and there duly excepted and the said exception was duly noted by the Justice, in his minutes.

And thereupon the witness further testified as follows:

By Mr. BAILEY:

"Q. Those bars were put there for protection were they, and warning? A. Yes, sir; for a warning.

"Q. Why did you not have more bars and run the bars further up? A. I think I have answered that question.

"Q. Try it again, if you have. I am not conscious of it. A. Well, the reason that this particular type and size of guard was adopted was because in our judgment it gave the best protection, at the same time giving the most comfortable and pleasant
28 riding convenience to the passengers; and the height of this bar here was governed by the fact that it would be impossible with a bar at that position for any person to stick their arm or hand out of the window, without raising it up and without striking that bar or some of the bars, and being aware that a bar was there.

"Q. Did you consider it possible that a passenger might put his head out of that upper part—over the bars? A. Yes, sir; possible.

"Q. Did you consider the possibility of a tall person being seated there and resting the arm on that bar, and letting it swing out? A. I put myself right in a seat of the car——

"Q. I ask you if you consider that. A. This is the consideration I gave it.

"Q. Yes. A. I considered it by seating myself in the seat in a car, and having the bar put at that place, and putting my arm on the bar, to see whether or not it was a position that would be likely to be taken.

"Q. Are these bars close enough together to prevent any one putting the hand up, and swinging the arm out like that (indicating)? A. They prevent any one putting the hand through without being aware of the bars being there. They do not prevent the hand going through; but it is impossible for the hand to go through without touching a bar, and knowing a bar is there.

"Q. When you spoke of the selection and the use of judgment in selecting this method of protecting passengers, you used the plural pronoun 'we'. To whom besides yourself do you refer? A.
29 The matter was referred by me before it was finally decided, to the president and to the vice-president and general manager of the company, as to the general type of the car, and the details were left to me and I made the decision as regards these guards after consulting with them and consulting with car builders and others who were familiar with the general conditions and general practice in such matters."

And next thereafter, the witness further testified: That he does not remember exactly how long he had the matter under consideration in regard to the selection of proper guards on these cars; that it might have been only a day or two, or it might have been two or three months; that he could not tell that. That he not only examined cars in operation in Philadelphia and Cincinnati, and consulted people there, but also examined cars that had been built in each of the shops there; for other companies in operation in different parts of the country. That he has seen cars of this general type elsewhere, although this particular type was, in some respects, different from anything that had ever been used; but this difference did not affect the windows. That this type of car is what is called a "semi-convertible car," for use in both winter and summer weather; that he has seen such cars elsewhere, in actual use, and thinks he has seen them with screens at the windows around Norfolk, though he is not sure: that he believes the Great Falls line here uses screens. That he has seen screens at one or two places, but it is the exception.

30 And next thereupon to maintain the issues upon its part joined the defendant produced as a witness JAMES F. MITCHELL, who testified that he is a practicing surgeon in the District of Columbia and has had considerable experience; that the condition of the left wrist of the plaintiff as disclosed by an X-ray photograph shows an injury to the lower end of the radius, the large bone of the wrist, and changes in all of the small bones of the wrist, and the so-called carpal bones. That these changes would interfere a great deal with the motions of the wrist proper but would have no effect at all as to the motion of the arm and ought to have no effect on the motions of the fingers; that judging from the photograph there is a great possibility of improvement by baking and massage and by moving the joint—what the doctors call passive motion.

And next thereupon the defendant produced evidence to prove that the maximum legal rate of speed of the defendant's cars at the time and place of said accident was 20 miles an hour.

And next thereupon the defendant produced evidence tending to prove that the fact that an accident had occurred to the plaintiff was not called to the attention of the conductor of the car in which she was riding, and that the conductor knew nothing of the happening of the accident at the time it occurred.

31 And thereupon the defendant rested; and neither party gave in evidence any further fact; and all of the testimony given by either party during the progress of the said cause is hereinbefore set forth.

And thereupon the plaintiff by counsel prayed the court to instruct the jury as follows:

1. If you believe upon all the evidence that the plaintiff was a passenger in one of the defendant's cars and seated at an open window of the car with her arm resting on one of the bars crossing the

window as shown in the evidence and that while in this position and the car in motion she made a gesture with her hand from the wrist outward keeping her arm still on the bar and that her fingers or hand struck against a trolley pole which the car was then passing and she was thereby injured as alleged by her, and that due care for the safety of passengers on that car required more space between said window and said trolley pole, and that when she made such gesture the plaintiff was not aware of the proximity of that trolley pole to that side of the car, your verdict should be for the
32 plaintiff.

But the Court denied said prayer and refused to so instruct the jury, to which ruling and the action of the court in refusing so to instruct the jury the plaintiff by her attorney then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next, the plaintiff by counsel also prayed the court further to instruct the jury as follows:

2. Although a passenger on one of defendant's cars should use reasonable care to avoid injury and the defendant is not to be held as insuring passengers against all injuries, yet it is the duty of the defendant to observe the utmost caution and vigilance in running its cars and in providing means and appliances for the safe conveyance of passengers and in giving notice to passengers of dangers which may result in consequence of the common habits of passengers and for the slightest negligence in the performance of that duty the defendant is liable to any passenger who sustains injury in consequence of such negligence.

But the court denied said prayer and refused to so instruct the jury, to which ruling and action of the court in refusing so to instruct the jury the plaintiff by her attorney then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next, the plaintiff by counsel also prayed the court further to instruct the jury as follows:

3. If you believe upon all the evidence that prior to the accident to the plaintiff in this case the defendant had been using, on its route on Connecticut Avenue between Rock Creek Bridge and
33 Chevy Chase, cars which were narrower than the car known as car No. 1, on which the plaintiff was riding at the time of the accident mentioned in the evidence and having windows open at the side next to trolley pole known as No. 216, and permitted passengers on said cars to be seated at such open windows without notice to them of danger by reason of said trolley pole or of any trolley pole at or near that part of said route and that in passing said trolley pole on one of said cars formerly in use the plaintiff could have safely and without danger of coming in contact with the trolley pole extended her fingers or her hand from that side of the car as far as she did from said car No. 1, at the time of the accident, and that a short time before the said accident the said car No. 1, was put in use on said route by the defendant without notice to passengers of increase of danger or of any danger by reason of the proximity of said trolley

pole and permitted the plaintiff to enter said car No. 1, as a passenger and to become and remain seated at an open window on that side of said car No. 1, and that while so seated the plaintiff without knowledge or notice that in passing said trolley pole she was much nearer thereto than she would have been on one of the cars formerly in use, and that she extended her fingers or hand from said window only four or five inches or about that distance and not more than she could safetly have extended the same from one of said former cars on the side next to said trolley pole, and that she was thereby injured, you should return a verdict for the plaintiff.

But the court denied said prayer and refused to so instruct the jury, to which ruling and action of the court in refusing so to
34 instruct the jury the plaintiff by her attorney then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next, the plaintiff by counsel also prayed the court further to instruct the jury as follows:

4. The question whether or not the plaintiff in extending her hand or any portion of her body a few inches outside the car No. 1 on which she was riding at the time of the accident was contributory negligence such as to preclude a recovery by her in this suit is a question of fact to be determined by the jury and in the determination thereof the jury should find in her favor unless they find that the injury to her was the proximate consequence of a failure on her part to use reasonable care in protecting herself from injury; and if the jury find upon the evidence that the plaintiff in so extending her hand outside the car had no reason to anticipate danger in so doing and that the defendant had failed to give reasonable notice to passengers of the danger in passing trolley poles or of the greater danger to passengers on said car No. 1, than on the cars formerly used by the defendant in passing trolley poles, then she was not guilty of contributory negligence and the verdict should be in her favor.

But the court denied said prayer and refused to so instruct the jury, to which ruling and action of the court in refusing so to instruct the jury the plaintiff by her attorney then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next, the plaintiff by counsel also prayed the court to further instruct the jury as follows:

35 5. In determining, upon the evidence, the question of contributory negligence and reasonable care on the part of the plaintiff, the jurors may take into consideration their own personal experience and observations as to the common habits of passengers on street railway cars in this District and whether or not it is the common habit of such passengers seated at windows of cars to rest their arms on the bases of the windows and when the windows are open to allow their arms to extend slightly outside the cars, and if the defendant ran its car No. 1 so close to said trolley pole No. 216 as barely to miss touching it in passing and failed to give reasonable notice to passengers or to the plaintiff of danger therefrom to be in-

curred by such common habits of passengers, and the plaintiff, without such or other notice to her of such danger in passing such trolley pole, was injured, your verdict should be for the plaintiff.

But the court denied said prayer and refused to so instruct the jury, to which ruling and action of the court in refusing so to instruct the jury the plaintiff by her attorney then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next, the plaintiff by counsel also prayed the court further to instruct the jury as follows:

6. If your verdict shall be for the plaintiff you should allow her such an amount as will reasonably compensate her for the natural consequences of whatever injury she has sustained and of whatever injury, if any, she will hereafter suffer according to the evidence and as alleged in her declaration.

But the court denied said prayer and refused to so instruct
36 the jury, to which ruling and action of the court in refusing so to instruct the jury the plaintiff by her attorney then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Thereupon the defendant by counsel prayed the court to instruct the jury as follows:

1. The jury are instructed as matter of law that upon the whole evidence their verdict should be for the defendant.

But the Court refused to grant the said prayer, which ruling and action of the Court the defendant, by its attorney, then and there duly excepted to, which exception was then and there noted by the justice in his minutes.

And next thereupon the defendant by its counsel prayed the court to instruct the jury as follows:

2. The jury are instructed as matter of law that no presumption of negligence on the part of the defendant arises in the case at bar from the mere happening of the accident in question on the occasion in question, to the plaintiff, and that the burden is upon her to prove by a preponderance of the evidence that at the time and place in question she was injured by the negligence of the defendant company.

To which prayer and proposed instruction the plaintiff by counsel then and there objected but the Court overruled the objection and instructed the jury as so prayed to which ruling and instruction the plaintiff by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

And next the defendant by counsel also prayed the court further to instruct the jury as follows:

3. If the jury shall find from the evidence that at the time
37 and place in question the plaintiff was a passenger on a car of the defendant company and was seated immediately adjacent to a window in the said car, and that the opening of the said window was guarded by four iron bars each of the diameter of about one-half of an inch, which bars extended across the said opening above the sill of the said window, parallel to each other and at a dis-

tance of three (3) inches from each other, the lowest one of which was at a distance of three ⅛ (3⅛) inches from said sill, and the remaining three of which were distant successively three (3) inches from each other, then the jury are instructed that the presence of the said bars in the said place was a warning to the plaintiff that it was dangerous for her to project any part of her body beyond the said bars; and if the jury shall further find from the evidence that the plaintiff at the time and place in question was seated immediately in front of one of the said windows and rested her arm upon the topmost of the said bars, and projected her hand to the extent of about four-and-a-half inches beyond the said top bar, and was thereupon injured by having her hand so projected strike against a trolley pole of the company situated at the distance of four-and-a-half inches from said top bar, and maintained there for the purpose of the operation of the said road, then the jury are instructed as matter of law that the plaintiff was guilty of contributory negligence and cannot recover in this action, and their verdict should be for the defendant.

But the court denied the said prayer and refused to so instruct the jury which ruling and action of the Court in refusing so
38 to instruct the jury the defendant, by its attorney, then and there duly excepted to, which exception was then and there noted by the justice in his minutes.

And next the defendant by counsel also prayed the court further to instruct the jury as follows:

4. If the jury shall find from the evidence that at the time and place in question the plaintiff was a passenger on a car of the defendant company and was seated immediately adjacent to a window in the said car, and that the opening of the said window was guarded by four iron bars each of the diameter of about one-half of an inch which bars extended across the said opening above the sill of the said window, parallel to each other and at a distance of three (3) inches from each other, the lowest one of which was at a distance of three ⅛ (3⅛) inches from said sill, and the remaining three of which were distant successively three inches from each other, then the jury are instructed that the presence of the said bars in the said place was a warning to the plaintiff that it was dangerous for her to project any part of her body beyond the said bars; and if the jury shall further find from the evidence that the plaintiff at the time and place in question was seated immediately in front of one of the said windows and rested her arm upon the topmost of said bars, and projected her hand to the extent of about four-and-a-half inches beyond the said top bar, and was thereupon injured by having her hand so projected strike against a trolley pole of the company situated at the distance of four-and-a-half inches from said top bar, and maintained there for the purpose of the operation of the said road; and if
39 the jury shall further find from the evidence that an ordinarily prudent person in the then position of the plaintiff and under the surrounding circumstances would not have so projected by her said hand, then their verdict should be for the defendant.

To which prayer and proposed instruction the plaintiff by counsel

then and there objected but the Court overruled the objection and instructed the jury as so prayed to which ruling and instruction the plaintiff by counsel then and there duly excepted, which exception was then duly noted by the Justice in his minutes.

Thereupon the court of its own motion charged and further instructed the jury as follows:

Charge to the Jury.

The COURT (Mr. Justice Wright): Gentlemen of the jury, the case presents two questions of main and principal importance. They are, first, the question whether or not the defendant was negligent; and second, whether or not the plaintiff was negligent. You understand from the experience you have had in such trials that if it develops from the evidence that both were negligent—that the plaintiff was negligent and that the defendant also was negligent, and that the fault of both contributed to the injury—then they are both to blame, and neither can say, against the other, with any hope of success, that th*at* other ought to stand the consequences.

40 You will first consider and determine the question whether or not the defendant is proven by the evidence to have been negligent; because unless the defendant was negligent there is no possibility of a verdict in favor of the plaintiff. To determine whether the defendant was negligent, you must understand somewhat the rules of law which govern the responsibility of public service corporations. A common carrier of passengers is by law under the duty of exercising the highest degree of care for the safety of its passengers. That does not mean, however, the highest degree of care for the safety of particular individuals who happen to get in the car. because the service to particular individuals is but a mere incident of the service of the general public. Common carriers of passengers are established by law for the purpose of serving the general public, and not for the purpose of serving particular or eccentric individuals. Therefore, when you come to the application of that general rule which places upon the common carrier of passengers the duty of exercising the highest degree of care for the safety of its passengers, you must remember the primary obligation which is upon the common carrier—and that is to serve the public generally, according to the demands of the travelling public with respect to its safety and its comfort as well. Therefore, the highest degree of care, and the sense in which that term ought to be accepted by this jury, is this: That the common carrier owes the highest degree of care which is compatible with the demands of the traveling public as an entity, and not the highest degree of care which is compatible with the demands of a particular individual who happens to get into its car.

41 Now, therefore, you will have to determine whether, in the maintenance of the pole in question as its particular proximity to the side of a passing car, together with what, if any, precautions the railroad company took to guard the traveling public who

used its cars against that pole, the company did discharge its duty of exercising the highest degree of care which was compatible with the demands of the general traveling public on its cars. You therefore have to consider the proximity of the pole. You have to consider the nature of the bars which the company maintained at the window of its car, at which the lady sat, for some purpose. Then you will have to say to yourselves, under those conditions—the proximity of the pole and the nature of the bars at the window—whether in that combination the company did discharge the duty which the law placed upon it of exercising the highest degree of care was compatible with the demands of the general traveling public. If it did, then it violated no obligation which the law put upon it and was not negligent, and independent of all other considerations it would be at no fault, and the plaintiff could not recover against it.

If you determine that question adversely to the company, and conclude from the evidence that, considering the proximity of the pole, the locality, the surroundings, the bars at the windows, and everything that bears on the question, the company did not exercise the highest degree of care that was compatible with the demands of the traveling public for the safety and comfort of the traveling public, while in its cars, then that finding would establish negli-
42 gence upon the part of the defendant company; and thereupon, before awarding a verdict for the plaintiff, you would have to proceed to another consideration. That is, the determination of whether or not it was the negligence of the company that directly occasioned the injury to the plaintiff. In determining what directly occasioned the injury, you would of course be brought in contact with the question of the plaintiff's own conduct, in order to say whether or not it was her fault, as well as the fault of the company which directly occasioned the injury. If it was the fact that although the company was negligent, yet she was also negligent in a way that directly contributed to her own hurt, then, as a practical proposition, she could not make out that it was the company's fault, and she cannot recover.

In determining whether or not she was negligent, you would have to take into consideration not only what she knew from past experience as a traveler over this road with respect to the presence and the proximity of poles, but you would have to take into consideration every other physical condition that was patent to her observation. In other words you have to consider not only what she actually knew but what she ought to have known from what she saw with her eyes, and what she felt with her hands and arms. Therefore you have to consider what a reasonable person should have understood and the significance of the bars at the window to be—whether or not a reasonable person should have understood the significance of those bars to be that there was danger of contact with obstructions outside of the bars, or whether a reasonable person would not have been called upon by the presence of the bars to be-
43 lieve that that was the significance which the company intended them to carry to the passengers who sat at the windows.

The Court cannot say as a matter of law that although the plain-

tiff confessedly knew there were poles along the line of the right-of-way, that there could be no justification which would warrant her for a moment in forgetting that the pole was likely to be there. That is matter of fact that you will have to consider as you will consider all other facts which tend to the determination of the question whether, with what she knew and what she saw, the nature of the car, and the window and the bars and the like, a person of reasonable prudence would have extended his hand from the window to the degree that she extended her hand. How far she extended her hand is another question of fact which you will have to decide from the evidence. You have to examine and determine in detail just how far she put her hand out, and whether, under all the circumstances of her environment and actual knowledge at the moment, a person of reasonable prudence and caution would have put his hand out as far as she put her hand out. If you find that a person of reasonable prudence would have so extended his hand, then she was not negligent in so doing. If, on the other hand you find that a person of reasonable prudence and caution, situated exactly as she was situated at that very place, knowing what she knew, seeing what she saw, and understanding the other physical conditions that were brought to her mind by her senses, would not have extended the hand as far as she extended hers, and thus come in contact with the pole, then she would have been negligent in adopting that conduct that a person
44 of reasonable prudence and caution would not have adopted under the circumstances. If you find, as I have stated that both she and the company were negligent, she cannot recover. The only theory upon which she can recover is that the company was negligent, and that she was not negligent; and that the negligence of the company was the direct and proximate cause of the injury.

If you find in her favor you will then consider and determine the question of damages. She would be entitled to such sum as would fairly compensate her for the physical and mental pain, suffering or distress she has endured as a direct result of the injury. If you find from the evidence that with reasonable certainty, she will in the future suffer particular pain or distress in that regard she would be entitled to a sum which would fairly compensate her for that. If you find that the nature of the injury is permanent (that is to say, such as will prevent her from pursuing her path through life as otherwise she might have done), then she will be entitled to such sum in that regard as will fairly compensate her. If entitled to recover at all, she would be entitled to recover further, and in addition, the reasonable expenses that she went to in order to cure herself. That does not mean what a doctor happens to say his bill is. It means the amount which it would be reasonable for him to charge. If you come to that point you will take the evidence of the doctor and determine from that and all other evidence which bears on the question, whether his charge was a reasonable one. If it was not, that item should be limited to what the evidence shows to be a reasonable charge. If it is a reasonable charge, and she is entitled to recover, that item should be included.

45 Thereupon the plaintiff and the defendant by counsel renewed each of the exceptions taken on their behalf respectively as hereinbefore set forth.

And next the jury retired to consider of their verdict and thereafter came into court and returned a verdict for the defendant, upon which verdict judgment was thereafter on the 15th day of June, A. D. 1910, entered, and thereafter the plaintiff by her attorney duly presented and submitted the foregoing bill of exceptions and prayed the court to settle and sign the same and cause the same to be entered of record, which is accordingly done nunc pro tunc this 1st day of August A. D. 1910.

DAN THEW WRIGHT, *Justice.*

The defendant will take notice that at 10 o'clock A. M. on the 22nd day of July, A. D. 1910, or as soon thereafter as counsel may be heard, the plaintiff will present to the court and move the court to settle, sign and enter of record, a bill of exceptions in the above entitled suit, of which proposed bill of exceptions the foregoing is a copy.

LORENZO A. BAILEY,
Attorney for Plaintiff.

Service of the foregoing notice and of a copy of the proposed bill of exceptions therein mentioned is hereby acknowledged this 11th day of July, A. D. 1910.

R. ROSS PERRY & SON,
Attorneys for Defendant.

46 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Aug. 2, 1910.

* * * * * * *

The Clerk of said Court will please prepare the transcript of record on appeal, including therein, Declaration, Plea, Joinder, Verdict, Judgment, Entry of Appeal, Citation and service, Entry showing appeal bond filed, Bill of Exceptions, Order extending time, this order.

LORENZO A. BAILEY,
Attorney for Plaintiff.

47 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 46, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is

made part of this transcript, in cause No. 51903 at Law, wherein Lillian M. Chapman is Plaintiff, and Capital Traction Company, a corporation is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of September, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2219. Lillian M. Chapman, appellant, vs. Capital Traction Company, a corporation. Court of Appeals, District of Columbia. Filed Sep. 9, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1911.

No. 2219.

LILLIAN M. CHAPMAN, APPELLANT,

vs.

CAPITAL TRACTION COMPANY, A CORPORATION.

BRIEF FOR THE CAPITAL TRACTION COMPANY, APPELLEE.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
G. THOMAS DUNLAP,
Attorneys for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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CAPITAL TRACTION COMPANY, A CORPORATION.

BRIEF FOR THE CAPITAL TRACTION COMPANY, APPELLEE.

Statement of the Case.

The declaration in the above-entitled cause was filed by the appellant, the plaintiff below, against the Capital Traction Company, defendant, and appellee here, on the 31st day of August, 1909. The averments of the declaration are substantially that on the 18th of July, 1909, the plaintiff took passage upon a car of the defendant company, known as a "pay-within" or "pay-as-you-enter" car. That she entered said car at the intersection of New York avenue and

15th street, in the city of Washington, and proceeded north along the lines of the said company; that she occupied a seat next to an open window, across which windows were bars, upon one of which the plaintiff rested her left arm; that from the place at which she entered the car to Rock Creek Bridge there were no trolley poles near the tracks upon which said car was proceeding; that while she was proceeding northward on Connecticut avenue, between Woodley Lane and Garfield street, immediately after passing said bridge, her left hand, which was momentarily turned from the wrist outward from the position of her arm on the bar, was caught in the forward movement of the car and thrust against a trolley pole, which pole was at a distance of five inches from said bar, and that her hand was thereby violently injured (R., pp. 1, 2).

The defendant filed a plea of not guilty (R., p. 3). The case was submitted to the jury, who, on the 7th of June, 1910, found a verdict for the defendant. No motion was made for a new trial, but on June 21, 1910, an appeal was taken to this honorable court (R., p. 3), which appeal now comes on for a hearing.

Paul Weir, a witness for the plaintiff, testified that he boarded the car in her company.

> "Just as they passed Woodley Lane the plaintiff was looking out of the window and she spoke something about a house in the course of construction on the left side of the tracks and, in calling witness' attention to it, she had her arm on the top bar of the window. She merely pointed over, directing his attention to the house and at that instant, passing a pole, the pole caught the outer end of her finger and drew her hand back and pushed her hand against the window jam (R., pp. 5, 6); that it was warm, clear weather, and all the windows in the car were open; that the plaintiff rested her arm on the top of the top bar. The motorman was in the front of the car and the conductor was in the rear. The con-

ductor is not supposed to leave that place in the pay-within cars; that there were no signs on the car cautioning passengers to be careful, not to put their heads or arms out of the window, and there was no sign of any kind notifying them of danger; that the first trolley pole or obstruction between the tracks at any point, after leaving 15th street and New York avenue, were the poles starting across Rock Creek Bridge; that it is the impression of the witness that the plaintiff rested her arm on the bar as soon as she sat down in the car; that at the time she was injured, her fingers did not extend any more than the length of the hand from the bars, by turning it over; that she did not raise her forearm off the bar in the least, she simply turned her hand over; that her fingers struck the rim or knob on the trolley pole, which extends over an inch from the pole itself. That this rim or knob is the widest part of the pole and is just level with the top of the top bar on which her arm rested on the car (R., p. 6); that he, in company with the plaintiff, had ridden out on those cars both before and since the accident to the plaintiff; that the witness and the plaintiff had previously ridden out to Chevy Chase on a number of those cars, but that the time of the accident to the plaintiff was the first time they had ridden out on one of those large cars" (R., p. 7).

The plaintiff herself testified as follows:

"That on the 18th of July, Sunday afternoon, she boarded pay-within car No. 1 of the defendant company, in company with Mr. Weir, at New York avenue and 15th street. They were new cars; that she sat in the front seat, next to the window; that it was very comfortable, and she put her left arm right on the top bar, as she saw people do; that it was comfortable for her to do that; that they rode out 14th street, then out U street and then out Connecticut avenue, and she remembers speaking of a new house at Woodley Lane and just slightly turned her head, not taking her arm off the bar; that her left hand was then struck" (R., p. 9).

"And next thereupon the witness indicated upon

the model of section of the car referred to by the preceding witness Weir in which the accident occurred, the attitude of her arm on the bar and the motion she made with her hand at the time the accident occurred, and the distance of the pole from the bar (R., p. 10).

"And next, thereupon, the witness further testified that she could tell by her glove that the point of the trolley pole hit the tips of her fingers and drew her hand back; that she identifies the glove produced in court before the jury as that she wore at the time of the accident; that it is a new glove and is torn between the thumb and the hand; that it was not torn before it struck the pole; that she had never before ridden on any of the large new cars of the defendant company; that the other cars on which she had ridden, previous to the accident, were much narrower and, consequently, further from the poles; that she put her arm on the top bar when she first got in the car and retained that position all the way to the place of the accident.

"That she was accustomed to ride out to Chevy Chase, or in that direction, on the Chevy Chase cars, every summer for the past ten years and over, during the warm months; sometimes twice a month, sometimes once a month, and sometimes oftener; that she knew that after the cars crossed Rock Creek Bridge they ran by overhead trolley and that the trolley posts were there; that she presumes she first observed them the first time she rode out there and has known for years about where they were" (R., p. 10).

That the model (shown her) is a true representation of the window at which she sat, and that the representation of the seat is accurate; that the bar (upon which her arm rested) is, she thinks, a true representation because it came below her shoulder and her arm rested comfortably there; that the bar came below her shoulder so that she had to raise her elbow to put it on the bar.

"Q. The bar came below your shoulder, so you had to raise your elbow to put it on it?

"A. Yes, sir; just the way I have it now (indicating)" (R., p. 10).

"Q. You knew there were no bars on the other cars, did you not?

"A. Yes, sir.

"Q. On the windows of the other cars?

"A. Yes, sir.

"Q. And in fact there were no bars on the windows of the other cars?

"A. Not that I know of.

"Q. I understand that the reason why you changed your arm or hand in any way as to its position was that you wanted to point out to Mr. Weir some house or some object to which you wished to call his attention?

"A. Yes, sir.

"Mr. PERRY, JR.: I would like to get her in that seat.

"(By means of a chair and the model heretofore referred to of the window, the witness illustrated how she sat by the window in the car in question)" (R., p. 11).

Thereupon, after offering certain medical testimony as to the extent of her injuries, the plaintiff closed her case.

The defendant then proved by the witness John McKay that the model which was produced before the jury, referred to in the testimony of the plaintiff and her witness Weir, was an exact duplicate of one window section including the base of the window and the floor and top of car No. 1, pay-within type (R., p. 11).

The witness McKay then further testified that the exact distance from the sill of the window in question on the outside, right under this first transverse bar, to said bar was three and one-eighth inches; that the distance from that bar to the horizontal bar immediately above it, was three inches; that the distance from the second bar to the one immediately above it, was three inches; that the distance from

the third bar to the fourth bar immediately above it, being the top bar, was three inches; that the diameter of each of those bars was approximately a half inch; and that each bar consisted of an iron rod (R., p. 11); that the distance from the sill of the window to the top of the fourth or highest of these bars was fourteen inches; that the distance from the top bar to the lower edge of the window sash when opened was thirteen and one-quarter inches (R., p. 12); that the two pieces of wood upon the model represent the seat; that said two pieces of wood, placed as they are (on the model), are an exact representation of the seat immediately in front of the window in pay-within car No. 1; that the distance from the seat to the top bar is twenty-two inches, and that the distance from the point where the back of the seat comes down to the seat itself is twenty-three and one-half inches; that the lower piece of the model represents the floor of the car (R., p. 12).

The witness John H. Hanna testified for the defendant as follows:

> "That car No. 1 of the defendant company, mentioned in the testimony of the preceding witness, weighs about 46,000 or 47,000 pounds, and is used entirely for the suburban or interurban service of the company. It is of the pay-within type. That the model produced in court, which has been mentioned in the testimony of the preceding witness, is a correct representation of a section of the car—a longitudinal section as to one window. That cars of the type of car No. 1 are generally used in interurban service—service running from the city out into the country. That the four bars across the windows of this car were put there by his direction" (R., p. 13).
>
> "Q. What did you do in regard to ascertaining the best safeguards to be used before you had that type, those four bars put there?
>
> "A. When the details of this car were being decided, I examined a good many cars on different roads, and a good many cars under construction in

the car shops—several car shops. I went to Philadelphia, and I saw a good many cars in the shops there, and a good many cars in the shops at Cincinnati, and I have examined cars on similar lines wherever I happened to be. After that, and after looking at the cars and discussing the question with the other officers of the company and with car builders who were familiar with the general practice, this was adopted as what we considered the best and the most up-to-date method of protecting the window that we could find.

"Q. State whether or not it would be practicable, in order to prevent any passenger from putting his or her arm or head or hand out of the window, to bar the window entirely, so as to have no window there at all?

"A. Yes, sir; of course the window could be closed with glass, or practically closed with a very fine screen.

"Q. And what are the practical objections to adopting any such protection as that?

"A. The objection is that these cars are designed for the comfort of the passengers. A good deal of the travel is excursion travel and we attempt to make them as comfortable for the passengers as we can. Any car with such a guard we consider would not be in any way as comfortable or pleasant to the traveling public as the guard we have put on this car.

"Q. What other device do you know of, if any, that is used in order to protect the passengers, by way of safeguarding the windows, that can be used at all for summer use?

"A. At times screens are used, a fine wire mesh screen. In my opinion, to be any better than this it would have to be so small a mesh as to prevent a finger from going through it. I have known of cases where that was used, but it is very unusual.

"Q. In order that passengers within may see out, and in order that in summer they may be able to get the advantage of the breeze, what is the reasonable limit, the practical limit, of the height of the protection, whatever it may be?

"A. The height of the protection is governed by the natural position of the passenger's arm in sitting, so

that it would come up well above the sill, and the hand in this position (indicating) could not be thrown out of the car without striking an obstruction. The distance between these window guards is governed as being the distance through which the hand cannot be placed without touching the bars and making the passenger aware of the fact that the bar is there; the idea being as soon as the bar is brought to the attention of the passenger, that is in itself a warning to the passenger that the hands or head or anything else should not be placed outside of the window.

"Q. With respect to the height of that top bar from the seat, what considerations governed the company in selecting that distance? Do you understand the question?

"A. Yes. I thought I answered that before. That was so as to get the top bar high enough to prevent the hand or arm from getting out without first coming in contact with the bar; not so high that it cannot be put out, but so that it cannot be put out of the window without touching the bar, and without being aware that the bars are there.

"That when he selected this method of protection for car No. 1 he knew it was to be used on the Chevy Chase line and that it would come within 4½ or 5 inches of the trolley pole; that he knew how far that trolley pole was from the car. That from the Zoo to Rock Creek bridge there is about the same distance from each trolley pole to the car" (R., pp. 13, 14).

The witness further said on cross-examination as follows:

"Q. Those bars were put there for protection were they, and warning?

"A. Yes, sir; for a warning.

"Q. Why did you not have more bars and run the bars further up?

"A. I think I have answered that question.

"Q. Try it again, if you have. I am not conscious of it.

"A. Well, the reason that this particular type and size of guard was adopted was because in our judgment it gave the best protection, at the same time giving the most comfortable and pleasant riding con-

venience to the passengers; and the height of this bar here was governed by the fact that it would be impossible with a bar at that position for any person to stick their arm or hand out of the window, without raising it up and without striking that bar or some of the bars, and being aware that a bar was there.

"Q. Did you consider it possible that a passenger might put his head out of that upper part—over the bars?

"A. Yes, sir; possible.

"Q. Did you consider the possibility of a tall person being seated there and resting the arm on that bar, and letting it swing out?

"A. I put myself right in a seat of the car——

"Q. I ask you if you considered that.

"A. That is the consideration I gave it.

"Q. Yes.

"A. I considered it by seating myself in the seat in a car, and having the bar put at that place, and putting my arm on the bar, to see whether or not it was a position that would be likely to be taken.

"Q. Are these bars close enough together to prevent any one putting the hand up, and swinging the arm out like that (indicating)?

"A. They prevent any one putting the hand through without being aware of the bars being there. They do not prevent the hand going through; but it is impossible for the hand to go through without touching a bar, and knowing a bar is there" (R., p. 15).

The witness further said upon cross-examination:

"That he not only examined cars in operation in Philadelphia and Cincinnati, and consulted people there, but also examined cars that had been built in each of the shops there, for other companies in operation in different parts of the country. That he has seen cars of this general type elsewhere, although this particular type was, in some respects, different from anything that had ever been used; but this difference did not affect the windows. That this type of car is what is called a 'semi-convertible car,' for use in both winter and summer weather; that he has seen such

> cars elsewhere, in actual use, and thinks he has seen them with screens at the windows around Norfolk, though he is not sure; that he believes the Great Falls line here uses screens. That he has seen screens at one or two places, but it is the exception" (R., p. 16).

The defendant further produced evidence to prove that the maximum legal rate of speed of its cars at the time and place of the accident was twenty miles an hour. Further, that the conductor of the car did not have his attention called on the occasion in question to the happening of the said accident, and knew nothing of it at the time of its occurrence (R., p. 16).

Thereupon the defendant rested and no further testimony was taken (R., p. 16).

The above is believed to be a fair statement of all the facts in evidence relevant to this appeal.

Consideration of the Appellant's Assignment of Errors.

Upon reference to page 4 of appellant's brief, containing her assignment of errors, it will be observed that only the first four are at all specific. The fifth assignment of error, based upon the refusal by the trial court to grant the plaintiff's first, second, third, fourth, fifth and sixth instructions, and upon the granting by said court of the defendant's second and fourth instructions, is in general terms and is not specific in any respect (Appellant's Brief, pp. 4, 5).

In this connection it is respectfully urged that the fifth assignment of error can not be considered because it is in violation of Rule No. 8, section 3, paragraph 2, of this court, which reads in part as follows:

> **"The assignment of errors relied upon by the appellant to be separately and specifically stated."**

In the case of District of Columbia *vs.* Robinson, 14 App. D. C., p. 512, the court held, p. 539, as follows:

> "From a general view of the changes made in the form of these instructions, we are satisfied of their correctness. It would involve a great consumption of time and space to point them out in detail and discuss their several effects, and there are no assignments of error that require us to do so. They are all general in form, like this, for example: 'The court erred in refusing to grant defendant's third prayer as asked, and giving it to the jury as modified.' The rules of the court require them 'to be separately and specifically stated.' Rule VIII, sec. 3, clause 2. 'Errors not assigned according to the rule of the court will be disregarded, though the court, at its option, may notice and pass upon a plain error not assigned.' *Id.*, sec. 5."

ARGUMENT.

I.

The appellant's first assignment of error refers to the exclusion of certain testimony offered by the appellant (R., p. 6). Upon the direct examination of the plaintiff's witness Weir her counsel asked of said witness the following question:

> "Referring to this attitude which she took, resting her arm on the bar, was it anything unusual or unlike the common habit of passengers on that car?"

In so far as this language is capable of accurate interpretation, the plaintiff offered to prove by the witness Weir that her attitude, resting her arm on the bar in question, was not unusual or unlike the common habit of passengers on the car in question. It appeared in the evidence of both plaintiff and said witness Weir that this was the first time they had ridden on the car in question. It did not appear that

either of them knew a single other passenger upon said car or that they knew any persons who had previously ridden upon cars of the type in question. This offer therefore was entirely incompetent to prove the common habits of passengers on the car in question, because no preliminary proof was offered of a knowledge of such habits on the part of the witness.

It is to be observed in the first place that the question as asked is objectionable on the ground that it is leading. In the second place the plaintiff herself was permitted to testify (R., p. 9), as follows:

> "That it was very comfortable, and she put her left arm right on the top bar, as she saw people do."

"Custom must be uniform, certain, definite and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care."

> R. R. Co. *vs.* Lindeman, 143 Fed. Rep., 946 (Circuit Court App., 8th Circuit, advance sheets), quoting U. S. Supreme Court and other cases.

The only authority cited by appellant is that of Georgetown, etc., Railway Company *vs.* Smith, 25 App. D. C., pp. 259, 270, 271. Counsel for the appellee are unable to find in the authority cited any support for the proposition under discussion. The discussion there concerned the naked question as to whether or not the projection by a passenger upon a street car of any portion of his body beyond the body of the car constituted negligence in law, a question which is not involved in the case at bar.

II.

The second assignment of error is based upon the refusal by the learned trial justice to permit the asking of the following question by counsel for the appellant of the witness Weir (R., p. 7):

> "How long, to your knowledge, had this pay-within car been in use on that line?"

The only possible relevancy of this question was in connection with the plaintiff's knowledge of the particular car on which the accident happened. On that point testimony was admitted without objection. The same witness, Weir, says (R., p. 7) that the time of the accident to the plaintiff was the first time they had ridden out on one of those large cars. The plaintiff herself says (R., p. 10) "that she had never before ridden on any of the large new cars of the defendant company; that the other cars on which she had ridden, previous to the accident, were much narrower and, consequently, further from the poles."

The only citation by counsel for the appellant in support of this assignment of error is section 158 of Beach on Contributory Negligence (2d edition). This section, and the authority cited, are only to the effect that notice of danger should be given by the carrier, and that the mere fact of the projection by a passenger on a railway of some portion of his body beyond the limits of the car is not always negligence in law. As to the notice that was given to all passengers upon the car by the presence of the window bars, something will be hereinafter said.

III.

The third assignment of error is based upon the refusal by the learned trial justice to admit evidence offered by the plaintiff to the effect that the trolley pole which struck her

was nearer to the car than other trolley poles between the Zoo and Chevy Chase Lake (R., pp. 7, 8, 15). No authority is cited by counsel for the appellant in support of this alleged error. The relevancy of this proffered evidence is not perceived. It is not pretended that the plaintiff's conduct on the occasion in question was influenced by her knowledge as to the exact position of any of these poles. In so far as their position was concerned her testimony, already quoted, shows that she had repeatedly ridden over the line for ten years and knew of the existence of these poles. In so far as it may be claimed that this evidence was competent to show the negligence of the company in maintaining the poles there, there was abundant evidence admitted as to the said position. The witness Jones testified (R., p. 5) as to the exact distance of trolley pole No. 216 (which it is said caused the accident), as also the exact position of poles 215, 217 and 218. The witness Weir testified (R., p. 7) that he and the plaintiff had measured two poles to the north of No. 216 and three or four poles to the south of it; that at two places they found the inner rail of the north-bound track and the inner rail of the south-bound track as near together as they were at pole No. 216; that these places were south of the point where the accident occurred. The witness Hanna testified (R., p. 14) that when he selected this method of protection (window bars) for car No. 1 he knew it was to be used on the Chevy Chase line, and that it would come within four and one-half or five inches of the trolley pole; that he knew how far that trolley pole was from the car; that from the Zoo to Rock Creek bridge there is about the same distance from each trolley pole to the car.

> "Q. Do you know how far the other trolley poles further out, and further in from that point, are from the car?
>
> "A. They vary probably an inch to an inch and a half, one from the other, due to the pole being a little out of plumb; but that is about the distance of all of them."

It is thus seen that in so far as the location of the poles was relevant to the question of negligence or not on the part of the defendant company in their location, the whole matter was before the jury, and this was the only respect in which the location was at all relevant.

IV.

The fourth assignment of error relates only to the question of damages. No special damages were alleged in the declaration, and therefore evidence as to the plaintiff's impaired or destroyed usefulness and capacity in her ordinary occupations as ladies' tailor, musician and painter was properly excluded. The alleged error, however, is irrelevant here inasmuch as a verdict was found by the jury for the defendant.

V.

As has been said the fifth assignment of error violates the rule of this court upon the subject. Counsel for the appellee, however, as a matter of abundant caution, will proceed to consider the specific errors averred in so much of the appellant's brief as deals with this general assignment.

(*a*) The first instruction prayed by the plaintiff was as follows (R., pp. 16, 17):

> "If you believe upon all the evidence that the plaintiff was a passenger in one of the defendant's cars and seated at an open window of the car with her arm resting on one of the bars crossing the window as shown in the evidence and that while in this position and the car in motion she made a gesture with her hand from the wrist outward, keeping her arm still on the bar, and that her fingers or hand struck against a trolley pole which the car was then passing, and she was thereby injured as alleged by her, and that due care for the safety of passengers on that

> car required more space between said window and said trolley pole, and that when she made such gesture the plaintiff was not aware of the proximity of that trolley pole to that side of the car, your verdict should be for the plaintiff."

The vice of this prayer is apparent in the fact that it makes no reference whatever to the warning given to the plaintiff by the presence of the bars upon the window in question. It asks the court to in effect instruct the jury that they must find for the plaintiff even though they might be satisfied from the evidence that the presence of the bars was an abundant precaution by the defendant against injury to the plaintiff, and even though the presence of the said bars would constitute a warning of danger to the plaintiff.

The case of Georgetown, etc., Railway Company *vs.* Smith, 25 App. D. C., 259, which is the only authority referred to in support of said prayer, was a case in which the car there in question had no protection whatever to the passengers save a running rail placed where the passengers would naturally rest their arms. Of the car in question in the case the court say, page 271:

> "The uncontradicted testimony shows that the space between two of these cars was not more than three inches, and it was gross negligence upon the part of the appellant to use cars which almost touched when they passed, and it was doubly negligent for them to run such cars with the panels taken out, with a running rail placed where passengers would naturally rest their arms."

In other words the car in question in that case, with the panels taken out, had nothing intervening between the floor and the top of the car, except one running rail such as we are all familiar with.

(*b*) The second instruction prayed by plaintiff was as follows (R., p. 17):

> "Although a passenger on one of defendant's cars should use reasonable care to avoid injury and the defendant is not to be held as insuring passengers against all injuries, yet it is the duty of the defendant to observe the utmost caution and vigilance in running its cars and in providing means and appliances for the safe conveyance of passengers and in giving notice to passengers of dangers which may result in consequence of the common habits of passengers and for the slightest negligence in the performance of that duty the defendant is liable to any passenger who sustains injury in consequence of such negligence."

The vice of this prayer is its generality. It is true that according to the decisions of the Supreme Court of the United States, common carriers of passengers are held to a very strict responsibility and are bound to provide for their safe conveyance so far as is practicable by the exercise of human care and foresight; yet they are not bound to provide the safest possible means of conveyance. The company is not required to provide its cars with all known and approved machinery necessary to protect its passengers from injury, but it is sufficient if it has all improved appliances which are in general use and which are necessary for the safety of passengers.

Central Vermont *vs.* Bateman, 26 U. S. Apps., 584.

Unger *vs.* Forty-second street, &c., R. R. Co., 51 N. Y., 497.

Richmond Railway, &c., Co. *vs.* Garthright, 92 Va., 627.

Again, the instruction is vicious in that it makes no reference whatever to the degree of care consistent with the practical carrying on of the business of the road. It has been ruled in a number of cases that a street railway com-

pany owes to the passenger "the highest degree of care which is consistent with the practical carrying on of its business."

Pitcher *vs.* Old Colonist Street Railway Company, 196 Mass., 69.

Nellis on Street Railways (2d edition), vol. 1, § 275 and cases cited.

Again, it is defective because it contains misleading language in the following respect: Giving notice to passengers of dangers which may result in consequence of the common habits of passengers. This language is so general and indefinite that no jury would understand its meaning and application. On this point the learned trial justice said as follows (R., p. 21):

> "A common carrier of passengers is by law under the duty of exercising the highest degree of care for the safety of its passengers. That does not mean, however the highest degree of care for the safety of particular individuals who happen to get in the car, because the service to particular individuals is but a mere incident of the service of the general public. Common carriers of passengers are established by law for the purpose of serving the general public, and not for the purpose of serving particular or eccentric individuals. Therefore, when you come to the application of that general rule which places upon the common carrier of passengers the duty of exercising the highest degree of care for the safety of its passengers, you must remember the primary obligation which is upon the common carrier—and that is to serve the public generally, according to the demands of the traveling public with respect to its safety and its comfort as well. Therefore, the highest degree of care, and the sense in which that term ought to be accepted by this jury, is this: That the common carrier owes the highest degree of care which is compatible with the demands of the traveling public as an entity, and not the highest degree of care which is compatible with the demands of a particular individual who happens to get into its car.

"Now, therefore, you will have to determine whether, in the maintenance of the pole in question as (to) its particular proximity to the side of a passing car, together with what, if any, precautions the railroad company took to guard the travelling public who used its cars against that pole, the company did discharge its duty of exercising the highest degree of care which was compatible with the demands of the general traveling public on its cars. You, therefore, have to consider the proximity of the pole. You have to consider the nature of the bars which the company maintained at the window of its car, at which the lady sat, for some purpose. Then you will have to say to yourselves, under those conditions—the proximity of the pole and the nature of the bars at the window—whether in that combination the company did discharge the duty which the law placed upon it of exercising the highest degree of care which was compatible with the demands of the general traveling public. If it did, then it violated no obligation which the law put upon it and was not negligent, and independent of all other considerations it would be at no fault, and the plaintiff could not recover against it."

Under the general language of the prayer asked by the plaintiff the jury might have found that it was possible for the defendant to have stationed a conductor by the side of each passenger to hinder the passenger from exposing any portion of his body. No such degree of care would be required under the circumstances of the case at bar.

The cases cited by the appellant upon this point are simply affirmations of the general principle referred to, and none of them affirm that it is the duty of the court to declare a general rule of law in such terms as to be misleading when applied to the facts of the particular case.

(*c*) The third instruction prayed by the plaintiff is as follows (R., p. 17):

"If you believe upon all the evidence that prior to the accident to the plaintiff in this case the defendant

had been using, on its route on Connecticut avenue between Rock Creek Bridge and Chevy Chase, cars which were narrower than the car known as car No. 1, on which the plaintiff was riding at the time of the accident mentioned in the evidence and having windows open at the side next to trolley pole known as No. 216, and permitted passengers on said cars to be seated at such open windows without notice to them of danger by reason of said trolley pole or of any trolley pole at or near that part of said route and that in passing said trolley pole on one of said cars formerly in use the plaintiff could have safely and without danger of coming in contact with the trolley pole extended her fingers or her hand from that side of the car as far as she did from said car No. 1, at the time of the accident, and that a short time before the said accident the said car No. 1, was put in use on said route by the defendant without notice to passengers of increase of danger or of any danger by reason of the proximity of said tolley pole and permitted the plaintiff to enter said car No. 1, as a passenger and to become and remain seated at an open window on the side of said car No. 1, and that while so seated the plaintiff without knowledge or notice that in passing said trolley pole she was much nearer thereto than she would have been on one of the cars formerly in use, and that she extended her fingers or hand from said window only four or five inches or about that distance and not more than she could safely have extended the same from one of said former cars on the side next to said trolley pole, and that she was thereby injured, you should return a verdict for the plaintiff."

The vices of this prayer are very numerous and need hardly be specified. It makes no mention whatever of the precautions which the defendant had used in placing bars upon the said window. Again, it assumes that there was no notice to passengers by reason of the said bars. Again, it assumes that the car upon which the plaintiff had formerly ridden was the same in general construction and especially with respect to the construction of the windows thereof as the

car upon which the plaintiff was seated. Again, it assumes that the proximity of the trolley pole was negligence in law, notwithstanding the guards put at the window. Again, it assumes that the plaintiff had the right to conduct her conduct on the car in question by what her conduct had previously been on a car of entirely different construction.

For these and many other vices the instruction was properly refused. The cases cited under this head of the appellant's brief do not seem to have any application to the questions raised in connection with the refusal of the plaintiff's third instruction.

(*d*) The plaintiff's fourth instruction was as follows (R., p. 18):

> "The question whether or not the plaintiff in extending her hand or any portion of her body a few inches outside the car No. 1, on which she was riding at the time of the accident was contributory negligence such as to preclude a recovery by her in this suit is a question of fact to be determined by the jury and in the determination thereof the jury should find in her favor unless they find that the injury to her was the proximate consequence of a failure on her part to use reasonable care in protecting herself from injury; and if the jury find upon the evidence that the plaintiff in so extending her hand outside the car had no reason to anticipate danger in so doing and that the defendant had failed to give reasonable notice to passengers of the danger in passing trolley poles or of the greater danger to passengers on said car No. 1, than on the cars formerly used by the defendant in passing trolley poles, then she was not guilty of contributory negligence and the verdict should be in her favor."

The same considerations which counsel for the appellee have urged in justification of the refusal to grant the plaintiff's third instruction apply with equal force to this.

(*e*) The plaintiff's fifth instruction was as follows (R., p. 18):

> "In determining, upon the evidence, the question of contributory negligence and reasonable care on the part of the plaintiff, the jurors may take into consideration their own personal experience and observations as to the common habits of passengers on street railway cars in this District and whether or not it is the common habit of such passengers seated at windows of cars to rest their arms on the bases of the windows and when the windows are open to allow their arms to extend slightly outside the cars, and if the defendant ran its car No. 1 so close to said trolley pole No. 216 as barely to miss touching it in passing and failed to give reasonable notice to passengers or to the plaintiff of danger therefrom to be incurred by such common habits of passengers, and the plaintiff, without such or other notice to her of such danger in passing such trolley pole, was injured, your verdict should be for the plaintiff."

This prayer was vicious inasmuch as it instructed the jurors that they might take into consideration their own personal experience and observations as to the common habits of passengers on street railway cars in this District, making no distinction whatever between cars whose windows are unguarded and those whose windows are guarded. It is further vicious in that it suppresses any reference whatever to the guards placed upon the window in the car in question, and the effect of such guards as notice of danger. It is further vicious inasmuch as it invited the jury to consider the individual experiences of each of them with respect to cars of different construction, with respect to sporadic and disconnected occasions, and with respect to persons who may have been more or less peculiar or careless in their habits. Again, it was vicious in that it did not correctly recite the testimony in the case at bar, inasmuch as the evidence of the plaintiff and of her witness Weir was to the effect that the injury resulted not from the plaintiff's resting her arm or hand on the

bar in question but in projecting her fingers while she was in the act of pointing out something, as will be more fully hereinafter developed.

(*f*) Plaintiff's sixth instruction related solely to the measure of damages, and inasmuch as that question is not relevant here, the verdict being for the defendant below, it is not necessary to refer to it. It is, however, not difficult to understand why it was not a proper prayer. It is vicious in two respects. The jury could not possibly understand from the evidence what were the "natural" or "unnatural" consequences of the plaintiff's injury. Of course compensation can only be given for what are in law the consequences of an injury, such as physical and mental pain and suffering, and so forth. The word "natural" furnished the jury with no guide whatever as to the elements of damage which the law allows to enter into a verdict. The second vice of the prayer is that the language is too general with respect to future suffering or loss consequent upon said injury. It makes no distinction between the reasonable certainty of such future injuries and a mere vague probability. However, the question is not relevant. A comparison of this prayer with the prayer actually given by the learned trial justice at the foot of page 23 of the record will indicate clearly why the trial justice preferred his own language to that of the prayer in question.

(*g*) The second instruction prayed by the defendant is as follows (R., p. 19):

> "The jury are instructed as matter of law that no presumption of negligence on the part of the defendant arises in the case at bar from the mere happening of the accident in question on the occasion in question, to the plaintiff, and that the burden is upon her to prove by a preponderance of the evidence that at the time and place in question she was injured by the negligence of the defendant company."

This prayer is in accordance with the opinion and decision of your honorable court in the case of Sullivan *vs.* Capital Traction Company, 34 App. D. C., 358, 367 *et seq.* The Supreme Court of the United States has recently decided the same proposition in the case of Mobile, etc., R. R. Co. *vs.* Turnipseed, 219 U. S., 35, 43.

(*h*) The fourth instruction prayed by the defendant is as follows (R., p. 20):

> "If the jury shall find from the evidence that at the time and place in question the plaintiff was a passenger on a car of the defendant company and was seated immediately adjacent to a window in the said car, and that the opening of the said window was guarded by four iron bars each of the diameter of about one-half of an inch, which bars extended across the said opening above the sill of the said window, parallel to each other and at a distance of three inches from each other, the lowest one of which was at a distance of three and one-eighth inches from said sill, and the remaining three of which were distant successively three inches from each other, then the jury are instructed that the presence of the said bars in the said place was a warning to the plaintiff that it was dangerous for her to project any part of her body beyond the said bars; and if the jury shall further find from the evidence that the plaintiff at the time and place in question was seated immediately in front of one of the said windows and rested her arm upon the topmost of said bars and projected her hand to the extent of about four and one-half inches beyond the said top bar, and was thereupon injured by having her hand so projected strike against a trolley pole of the company situated at the distance of four and a half inches from said top bar, and maintained there for the purpose of the operation of the said road; and if the jury shall further find from the evidence that an ordinarily prudent person in the then position of the plaintiff and under the surrounding circumstances would not have so projected her said hand, then their verdict should be for the defendant."

This instruction the court granted, thus submitting the question of the negligence or not of the plaintiff's said act in so projecting her said hand to the decision of the jury, although holding as matter of law that the presence of the bars constituted a warning. According to the testimony of the plaintiff's own witness Weir (R., p. 6), after the accident he "ascertained, by measurement, that the distance from the top bar of the window, at which the plaintiff was seated, of car No. 1, to the rim or knob of pole No. 216 (the '2' is by mistake of the printer left out at page 6 of the record) is a little over 4½ inches; that he made such measurement on July 24 while the car was going and several times since and got the same result—four and one-half inches." Inasmuch as the plaintiff's hand was struck by the pole, she must have projected it at least four and one-half inches.

That the plaintiff's rights were fully guarded and stated in language that was entirely just to her will be evident from the following portion of the charge of the learned trial justice (R., pp. 22, 23):

> "If you determine that question adversely to the company, and conclude from the evidence that, considering the proximity of the pole, the locality, the surroundings, the bars at the windows, and everything that bears on the question, the company did not exercise the highest degree of care that was compatible with the demands of the traveling public, while in its cars, then that finding would establish negligence upon the part of the defendant company; and thereupon, before awarding a verdict for the plaintiff you would have to proceed to another consideration. That is, the determination of whether or not it was the negligence of the company that directly caused the injury to the plaintiff. In determining what directly occasioned the injury, you would, of course, be brought in contact with the question of the plaintiff's own conduct, in order to say whether or not it was her fault, as well as the fault of the company which directly occasioned the injury. If it

was the fact that although the company was negligent, yet she was also negligent in a way that directly contributed to her own hurt, then, as a practical proposition, she could not make out that it was the company's fault, and she cannot recover.

"In determining whether or not she was negligent, you would have to take into consideration not only what she knew from past experience as a traveler over this road with respect to the presence and the proximity of poles, but you would have to take into consideration every other physical condition that was patent to her observation. In other words, you would have to consider not only what she actually knew, but what she ought to have known from what she saw with her eyes, and what she felt with her hands and arms. Therefore, you have to consider what a reasonable person should have understood and the significance of the bars at the windows to be—whether or not a reasonable person should have understood the significance of those bars to be that there was danger of contact with obstructions outside of the bars, or whether a reasonable person would not have been called upon by the presence of the bars to believe that that was the significance which the company intended them to carry to the passengers who sat at the windows. The court cannot say as a matter of law that, although the plaintiff confessedly knew there were poles along the line of the right of way, that there could be no justification which would warrant her for a moment in forgetting that the pole was likely to be there. That is matter of fact that you will have to consider as you will consider all other facts which tend to the determination of the question whether, with what she knew and what she saw, the nature of the car, and the window and the bars and the like, a person of reasonable prudence would have extended his hand from the window to the degree that she extended her hand. How far she extended her hand is another question of fact which you will have to decide from the evidence. You have to examine and determine in detail just how far she put her hand out, and whether, under all the circumstances of her environment and actual knowledge at

the moment, a person of reasonable prudence and caution would have put his hand out as far as she put her hand out. If you find that a person of reasonable prudence would have so extended his hand, then she was not negligent in so doing. If, on the other hand, you find that a person of reasonable prudence and caution, situated exactly as she was situated at that very place, knowing what she knew, seeing what she saw, and understanding the other physical conditions that were brought to her mind by her senses, would not have extended the hand as far as she extended hers, and thus come in contact with the pole, then she would have been negligent in adopting that conduct that a person of reasonable prudence and caution would not have adopted under the circumstances. If you find, as I have stated, that both she and the company were negligent, she cannot recover. The only theory upon which she can recover is that the company was negligent, and that she was not negligent, and that the negligence of the company was the direct and proximate cause of the injury."

VI.

Affirmative Points and Authorities of Appellee

A.

Location of Poles.

A public-service company can only locate its tracks, and the poles necessarily connected therewith in the case of overhead trolleys, upon such roads and in such position on said roads as the proper municipal authorities direct. The distance of the tracks from each other and the places where the poles necessary for overhead trolley operation are located must be approved by said authorities. It is evident that in making such location the municipal authorities must consult the rights of pedestrians and of persons driving car-

riages and other vehicles along those roads. If we consider absolute safety, the tracks should be so far apart, and the poles so far distant from each track, that no accident could result from the carelessness of passengers in protruding any part of their bodies from the windows or platforms of cars passing along said roads. This, however, cannot be. The traveling public have rights as well as the passengers upon railroad cars. Therefore all that can be reasonably required is that the tracks shall not be so close together, and the trolley poles between the tracks shall not be so near to the cars running thereon, as to be dangerous to passengers in the cars exercising the care and prudence of an ordinarily careful and prudent man.

In the case of State, use of Sharkey, *vs.* The Lake Roland Elevated Ry. Co., 84 Md., 163, the Court of Appeals of Maryland said, page 168:

> "Nor is there anything in this case tending to impute any negligence to the appellee in the structure and care of its track, or in any of the subsidiary arrangements necessary to the safety of the passenger. The appellee's cars being propelled by electricity, it was necessary that the trolley wires charged with electricity should be suspended over the tracks, and to do this it was necessary that poles should be placed between the tracks for their support. There is nothing in the record indicating that the location of the poles between the tracks, or the distance from the tracks at which they were planted, was either unusual or dangerous in railway construction. Nor was there any negligence on the part of the defendant company in failing to have a bar on the left-hand side of the car. There was no obligation on the defendant company to restrict passengers to their places, nor to prevent persons, old enough and intelligent enough to take care of themselves, from acts of imprudence. Passengers who performed their part of the contract for transportation by obeying the regulations of the company were not endangered by the proximity of the poles to the tracks, nor injured by the absence of the bar on the left side of the car."

In the case of the Interurban Railway & Terminal Company *et al. vs.* Hancock, 75 Ohio State, page 88, the Supreme Court of Ohio say, page 111:

> "Assuming, therefore, that the rule respecting the conduct of a passenger on a steam car is to forbid his extending his arm out of the car window without himself assuming the risk of injury, should a different rule be applied to a passenger on an interurban electric car? We are of opinion that there should not be. As such cars are now operated throughout the country, they run at a rapid rate. Their construction ordinarily, if not necessarily, involves the maintenance near the tracks of poles and barriers of various kinds. Cars running in opposite directions, as well as the switches where there is a double track, are often necessarily run near together. There is, perhaps, more necessity for locating tracks near together inside of municipalities than in the open country, and upon narrow streets it often happens that the company is required to lay these rails at less distance apart than they would prefer to place them, because of crowded conditions and the requirements of the municipal authorities. To say that, as a rule of law, a passenger on such car may be heedlessly negligent, exposing his person to needless danger, and visit the consequences on the Interurban Company, upon showing negligence on its part, appears to us to be without reason. Nor is it supported by authority. On the contrary, the general recognized rule is that the passenger cannot pass upon the carrier responsibility for an event, which, except for his own contributory negligence, would not have happened, and the law, as always held in this State, does not undertake, when both parties have been negligent, to measure the degree of the negligence of each. And we are of opinion that no substantial reason exists why these same rules of care and of responsibility in the particulars stated imposed upon the passenger in the steam car ought not to be held to apply to the same passenger in an electric interurban car."

There is no evidence in the record tending to show that the appellee's railroad at the point of accident, or, in fact, anywhere, was of unusual or of unnecessary or improper construction. The court cannot assume from the mere happening of the accident that the construction was improper or negligent.

B.

The Plaintiff's Injury Was Caused by the Negligent Projection of Her Hand.

The case at bar is not one in which the passenger was hurt by resting her elbow upon the sill of the window nor upon the bar over the sill. It is not denied that she was hurt because she projected her hand four and a half inches beyond the side of the car in order to point out an external object to her companion. She indicated to the jury just how she did project her hand. The jury saw the witness in that act, and this appellate court cannot see it. The plaintiff was also permitted to exhibit to the jury the glove which she had upon the injured hand and the physical marks upon it. They were better able than this appellate court to determine how far the hand was thrust out. Under the instructions of the court, it was left entirely to the jury to say whether or not such projection was a negligent act.

C.

The Question of Negligence as to said Projection of Her Hand by the Plaintiff is Not a Question of Mere Distance.

In the case of Clarke's Administrator *vs.* Louisville & Nashville R. R. Co., 101 Ky., 34, the Court of Appeals of Kentucky say, page 45:

> "We cannot furnish any rule by which to measure the distance a passenger may protrude his arm before it can be said he is guilty of negligence. It is the fact that it is so, without any qualifying circumstances impelling him, not the distance so protruded, that constitutes the negligence."

In that case the record showed, page 38 of the report:

> "That the intestate was sitting on the left side of the car by a window that was hoisted; that he took hold of the left lapel of his coat with his left hand for the purpose of raising same so as to enable him to put his eyeglasses in his vest pocket on the left side with his right hand; that as he raised the left lapel of his coat with his left hand for the purpose stated he, without intending to do so, protruded the elbow of his left arm through the open window, not more than three inches beyond the place where the sash would be when the window is shut, and not more than one and a half inches beyond the outer surface of the side of the car; that when his elbow was thus protruded the upright timbers in the tunnel were in such close proximity to the side of the car that they struck his arm near the elbow."

In the case of Dun *vs.* Railroad Co., 78 Va., 645, where the Court of Appeals of Virginia held the passenger guilty as matter of law in having his arm protruding outside the open window of the car in swift motion, it appeared, page 652, that the extent of the protrusion was only about two inches.

In the case of the Interurban Railway & Terminal Co. *et al. vs.* Hancock, 75 Ohio State, page 88, the distance was from three to four inches (page 91).

It is useless, however, to multiply authorities.

D.

It is Not Necessary for a Railroad Company to Barricade Windows.

The car in question was constructed for suburban service. The same model which the jury had before them will be shown to your honorable court upon the hearing.

In the case of Dun *vs.* R. R. Co., 78 Va., 645, the Court of Appeals of Virginia say, page 663:

> "The carrier is held to the utmost care and circumspection which can be exercised under all the circumstances so far as human care and foresight can go. It ought not to be held necessary, and can be so held upon no sound principle, that the carrier should barricade and bar the window, to the partial exclusion of light and air, and to the discomfort, and, in case of collision or other accident, of like kind, at a sacrifice of the safety of all. It many times happens, when trains have collided and the cars telescoped, the doors are jammed up so as to be useless; fire is often the immediate result, and the open windows on such cars furnish the only means of escape from a horrible death. To bar the windows would increase the danger as well as the discomfort of railroad travel. And the same reason which commends the bars on the windows would as well require the doors to be locked and barred; and then all these precautions would prove unavailing where the passengers sought to avoid the restraints thus imposed. We do not think such restraint and precautions ought to be held necessary in order to prevent intelligent and rational beings from thrusting their heads or their limbs through the windows of swiftly-moving trains."

In the case of Interurban Railway & Terminal Co. *et al.* *vs.* Hancock, 75 Ohio State, 88, the court, on this point, say as follows, page 105:

"Windows are not provided in cars that passengers may project themselves through and out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without occupation."

In the case of Pittsburgh & Connellsville R. R. Co. *vs.* McClurg, 56 Pa. St., 294, the Supreme Court of Pennsylvania say, page 297:

"A passenger, on entering a railroad car is to be presumed to know the use of a seat, and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy—but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there; nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all."

So in the case of the Indianapolis & Cincinnati R. R. Co. *vs.* Rutherford, 29 Ind., 82, the Supreme Court of the State of Indiana held, page 85:

"A passenger is as much bound to use reasonable care to avoid injury as the carrier is to use the greatest degree of skill and care to save the passenger from harm. Nor does the duty of the carrier extend to the imprisonment of the passenger so as to prevent the latter, by his recklessness or folly, from voluntarily exposing himself to needless peril. Though a passenger, he is nevertheless a free man. Railway coaches are provided with windows to promote the health of passengers by affording light and ventilation, and that the tedium of a journey may be relieved in some degree, and its pleasures enhanced, by viewing the ob-

jects along the route. The place for the passenger is inside, not outside, of the coach, and this is known to everybody who ever saw a railway coach. The carrier is no more bound to barricade the windows, to prevent passengers from extending their limbs outside, than he is to lock the doors to prevent them from going from car to car when the train is in motion, and thus voluntarily subjecting themselves to the dangers obviously incident to that act of rashness. The same reason which would require the one thing would also require the other; nay, it is not easy to see why it would not require that the passenger should be so restrained of his liberty in every respect that he could not, by any act of his own, put himself in unnecessary danger. Such a power in railroad officials must exist, if the duty to exercise it exists. The obligation to answer in damages cannot be separated from the authority to do what is necessary to avoid liberty. The law recognizes no such duty as resting upon the carriers of passengers, nor have they any authority to exercise such unreasonable and annoying power over those whom they carry. Their passengers are not their slaves, nor are the latter absolved from the duty of using ordinary care for their own safety. Unwarranted, officious and insulting interference with the liberty of passengers by railroads, had proceeded in this State to such a point that the legislature, at its last session, deemed it necessary to interfere and impose severe penalties to prevent one form of the annoyance. Acts 1867, p. 165."

E.

The Presence of the Bars on the Window in Question Constituted a Warning of Danger.

What else could they constitute? The presence of bars on a window is a warning and much more than a warning to those who are within to keep in, and to those who are without to keep out.

In the case of the Interurban Railway & Terminal Co. *et al. vs.* Hancock, 75 Ohio State Rep., 88, there were bars upon the window in question, arranged in very much the same way as those in the case at bar. Upon this point the Supreme Court of Ohio says, page 113, as follows:

> "Recurring again to the evidence, it appears that there were four rods or bars across the windows of the car, including the one in question, and that the highest rod was a foot above the window sill. It was upon the top rod or bar that the plaintiff rested his arm. The purpose of these rods is in dispute. It would seem that, whatever other purpose they might subserve, if any, they were calculated to warn the passenger to keep his person inside the car. It is urged that they were placed there to keep packages and children from falling out. They might serve, in a measure, to further these objects; but passengers' arms are of more consequence than packages, and a warning to children might with equal propriety be heeded by adults. Again, it is urged that they were placed outside the window to protect it. If that were the object, the wonder is that they were not continued higher up. Again, it is insisted that they constituted an invitation to the passenger to rest his arm upon the upper one. As well might it be urged that the bar or strap found on summer cars, extending on one side from one end to the other, and whose manifest object has been always supposed to be to keep passengers from alighting on that side, and others from entering, is after all not for those purposes, but for the purpose of affording the passenger a convenient resting place for his arm. The proposition surely lacks reason."

In the case cited the following appears (R., p. 90):

> "It appeared by the testimony that the plaintiff was seated in the last seat in the car, on the left-hand side at an open window. All the windows of the car were open, the window-frame dropping down into a box arrangement. The sill was about six inches above the seat. On the outside of the car, and across all the

windows, the ends as well as sides, were four iron rods or bars equally distant from each other, the top rod being approximately twelve inches above the window-sill. The plaintiff placed his left arm on the top of and over the rods. He described it by saying: 'I was leaning back with my arm resting on the rod of the car, my hand on the inside. The accident occurred at a slight curve in the tracks, and was occasioned by the arm being struck by the west-bound car. I had my arm,' the plaintiff further stated, 'resting on one of these rods across the window, and was struck by a Cincinnati, Georgetown and Portsmouth car; I saw the car and the handles on the side. It was an open car.' "

The trial justice granted the following instruction (R., p. 91):

"If you find from the evidence that the plaintiff, at the time of the alleged accident and injury, was riding in one of the cars of The Interurban Railway & Terminal Company, one of the defendants herein, and you further find that there were four iron bars extending horizontally across the windows of said car, equally distant from each other, the top rod of which was approximately twelve inches from the window-sill, and you find that plaintiff, while seated in this car, permitted or allowed his arm or any part thereof to extend or project out beyond or over said rods, and that said act of plaintiff directly contributed to the accident, then I charge you that the plaintiff was guilty of contributory negligence and can not recover, and your verdict should be for the defendants."

This instruction was approved by the appellate court (R., p. 114).

In the case of Christensen *vs.* Metropolitan Street Ry Co., decided by the Supreme Court of Appeals of the United States for the Eighth Circuit, 137 Fed. Rep., 708, there was a screen across the lower half of the window of the car. At page 711 the court say:

"While a street railway company engaged in the transportation of passengers, as the defendant in this case was, is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances for the protection of its passengers, yet it has a right to assume that passengers patronizing its cars will travel in the usual way, and occupy the seats provided for that purpose, or, if the car is crowded, those standing will occupy the open space, or aisle, in the center of the car between the seats, and in either case the screens upon the windows of the car in which the plaintiff was injured were entirely sufficient to protect passengers from any involuntary action on their part, such as might be caused by a lurching or swaying of the car while the car was in motion."

* * * * * * *

"While the plaintiff's sudden illness undoubtedly placed her in a very uncomfortable and distressing position, yet that fact would not authorize her to disregard unmistakable warnings of danger. She must have known that the heavy screens which barred the windows were placed there for no other purpose than to prevent passengers from extending their arms or heads out of the windows, as the meshes in the screen were too large to serve any other purpose. To disregard this plain warning was, we think, such contributory negligence upon her part as will necessarily preclude a recovery in this case" (p. 712).

In the case of Harding *vs.* Philadelphia Rapid Transit Company, 217 Pa. St. Rep., page 69, the Supreme Court of Pennsylvania said as follows, page 70:

"It is argued by appellant that he was not warned by the conductor of the danger of his position. But the lowered bar was sufficient warning in itself. It was noted that the running board on that side was a place of danger, and that passengers were not expected, nor so far as the condition could control the situation permitted, to use it even if the limited purpose of getting on or off the car for which the running board is intended."

F.

Conduct of the Plaintiff in the Case at Bar Constituted Negligence per se.

As the court is aware, it has been held by a great number of authorities that where a passenger projects any part of his body through a window or other opening of a car beyond the body of the car and is thereby injured, such conduct on his part constitutes negligence *per se*. It has likewise been held by a great number of authorities that there is no difference so far as this doctrine is concerned between steam railroads or urban and interurban street railroads propelled by steam or electricity. That question, however, is not involved in this case inasmuch as the learned trial justice refused to hold that the plaintiff in the case at bar was guilty of negligence *per se,* and submitted the question of her negligence to the determination of the jury.

In the case of Georgetown & Tennallytown Ry. Co. *vs.* Smith, 25 App. D. C., page 259, this honorable court held, page 269, after a full and able discussion of the question and of the conflicting cases in its opinion, and after citing a great number of authorities, that, "the weight of authority is that the question of negligence is a question of fact for the jury, and not a question of law to be ruled upon by the court."

In that case, as has been said, the side of the car was open from the floor to the top of the car, and there was only the long wooden rail extending the length of the car and in front of the opening to protect the passenger. In view of this decision, counsel for the appellee do not consider themselves at liberty to argue the general question as involved in the facts of that case. We respectfully submit, however, in the case at bar, that under the physical circumstances of the case a peremptory instruction should have been given to the jury to find for the defendant.

While there are cases to the effect that where there were no bars or screens at the car window, it should have been left to the jury to determine whether or not the company was guilty of negligence in not putting such screens or bars there, counsel have been unable to discover any case in which it has been decided that where there were screens or bars at the window, it was not negligence in law for the passenger to thrust any part of his body through them. Upon this subject Mr. Thompson says, in his Commentaries on the Law of Negligence, vol. 3, sec. 2975, as follows:

> "2975. Whether the railroad company should erect barricades or guards to prevent people from putting their hands and arms out of the window.—If a railroad company will construct its tracks so near to standing columns or poles, wood piles which it has placed by the side of its track on the sides of bridges or tunnels as to endanger the life or limb of a passenger who thrusts even his elbow beyond the external wall of its car, then it would seem that the rule of law which puts upon a carrier of passengers the obligation of exercising the highest degree of practical care and foresight, to the end of protecting his passenger from danger while in transit, should require him to take the simple precaution of inserting wire screens or metallic rods in the windows of his coaches, so as to defend passengers against injuries of this kind. Accordingly, it has been held that whether reasonable diligence on the part of a street railway company in the protection of its passengers, requires it to prepare barricades or guards to prevent passengers from putting their hands or arms out of the windows of its cars, is a question for a jury."

He cites as authority the case of New Orleans & C. R. Co. *vs.* Schneider, decided by the Circuit Court of Appeals of the United States for the Fifth Circuit, 60 Fed. Rep., page 210. In that case the passenger was seated by an open window which was not protected in any way by screens or bars. McCormick, circuit judge, said, page 212:

> "It is for the jury to say whether reasonable diligence required that barricades or guards should have been used by the defendant to prevent its passengers from putting their hands and arms out of the windows."

In the case at bar, the learned trial justice went further and instructed the jury as follows:

> "In determining whether or not he was negligent, you would have to take into consideration not only what she knew from past experience as a traveler over this road with respect to the presence and the proximity of poles, but you would have to take into consideration every other physical condition that was patent to her observation. In other words you have to consider not only what she actually knew, but what she ought to have known from what she saw with her eyes, and what she felt with her hands and arms. Therefore you have to consider what a reasonable person should have understood and the significance of the bars at the windows to be—whether or not a reasonable person should have understood the significance of those bars to be that there was danger of contact with obstructions outside of the bars, or whether a reasonable person would not have been called upon by the presence of the bars to believe that that was the significance which the company intended them to carry to the passengers who sat at the windows. The court cannot say as a matter of law that although the plaintiff confessedly knew there were poles along the line of the right of way, that there could be no justification which would warrant her for a moment in forgetting that the pole was likely to be there. That is matter of fact that you will have to consider as you will consider all other facts which tend to the determination of the question whether, with what she knew and what she saw, the nature of the car, and the window and the bars and the like, a person of reasonable prudence would have extended his hand from the window to the degree that she extended her hand. How far she extended her hand is another question of fact which you will have to decide from the evidence. You have to examine and determine in de-

> tail just how far she put her hand out, and whether, under all the circumstances of her environment and actual knowledge at the moment, a person of reasonable prudence and caution would have put his hand out as far as she put her hand out. If you find that a person of reasonable prudence would have so extended his hand, then she was not negligent in so doing. If, on the other hand, you find that a person of reasonable prudence and caution, situated exactly as she was situated at that very place, knowing what she knew, seeing what she saw, and understanding the other physical conditions that were brought to her mind by her senses, would not have extended the hand as far as she extended hers, and thus come in contact with the pole, then she would have been negligent in adopting that conduct that a person of reasonable prudence and caution would not have adopted under the circumstances."

In the case of Christensen *vs.* Metropolitan Street Ry. Co., decided by the Circuit Court of Appeals of the United States for the Eighth Circuit, 137 Fed. Rep., page 708, the court decided that where a screen covered the lower half of the window, and a female passenger was injured by putting her hand over the top of the screen, she was guilty of negligence in law. As this case has already been quoted from very fully on another point, it is only necessary to add here the following quotation, from page 712:

> "While the questions of negligence and contributory neglicence are ordinarily questions of fact to be passed upon by a jury, yet if it clearly appears from undisputed facts, judged in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, or where the evidence is of such a conclusive character that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of a jury."

In considering the case just quoted from, it is important to bear in mind that in so far as the plaintiff in the case at bar is concerned the presence of a solid board would not have protected her, for she deliberately raised her elbow to the top of the highest bar and not only rested her hand upon that during the entire journey, but projected her hand therefrom.

It is respectfully urged that no error was committed by the learned trial justice and that the judgment below should be affirmed.

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